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Welsh Affairs Committee

Legislative Competence Orders in Council

Second Report of Session 2006–07

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written evidence*

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The Welsh Affairs Committee

The Welsh Affairs Committee is appointed by the House of Commons to examine the expenditure, administration, and policy of the Office of the Secretary of State for Wales (including relations with the National Assembly for Wales).

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Summary

Under the provisions of the Government of Wales Act 2006, following elections to the National Assembly of Wales in May the Assembly's Executive and Legislature formally separated. Although the 2006 Act itself confers very limited law making powers on the Assembly initially, it also allows the National Assembly of Wales to seek to enhance these powers, given Parliamentary consent, by way of a new procedure known as Legislative Competence Orders in Council. These new powers sit alongside a procedure whereby Acts of Parliament may prescribe matters on which the National Assembly may legislate within the areas – known as “Fields” – for which it has responsibility. As the voice of Wales at Westminster, we welcome the opportunity to contribute to this process by being involved in the pre-legislative scrutiny process of draft Orders in Council, and the opportunities for working jointly with committees of the National Assembly which this offers.

We fully support the presumption that draft Orders will be subject to pre-legislative scrutiny. However, we have some concerns for the implications this may have for our own timetable and express our reservations should the annual number of proposed Legislative Competence Orders exceed what we judge to be “manageable”. Should this be the case, we see merit in the appointment by the House of Commons of *ad hoc* committees set up specifically for the purpose of examining a proposed Legislative Competence Order, as is to be the case in the National Assembly. In addition, we believe there is a role for the Welsh Grand Committee in scrutinising particularly complex or contentious draft Legislative Competence Orders.

We recommend that Parliament's business managers co-ordinate the timetables of the House of Commons and the House of Lords to ensure that pre-legislative scrutiny of proposed Orders is concurrent rather than consecutive. We re-iterate our earlier recommendation that consideration of draft Orders be taken on the floor of the House.

We are also concerned that, while the Legislative Competence Order procedure has been designed mainly with a high degree of specificity in mind, Matters added by statute in a parallel procedure are likely to be much more general in nature and not introduced with a particular Measure in mind. Nor would Matters added by provisions in bills of a general nature passing through Westminster be subjected to anything like the same degree of pre-legislative scrutiny as is envisaged for Legislative Competence Orders.

Moreover, it is essential in the interests of transparency that an up-to-date consolidated list of Fields is published on the National Assembly's website, and we welcome the Presiding Officer's assurance that this will be the case.

We are also aware of the possibility that the procedure for dealing with Legislative Competence Orders may be subject to additional pressures in the event of the administrations in Cardiff and at Westminster being of a different political hue.

1 Introduction

1. The Government of Wales Act 2006 introduced a new mechanism for enhancing the legislative powers of the National Assembly for Wales on a case-by-case basis and with Parliamentary consent. The Act conferred on the Assembly the power to initiate Legislative Competence Orders in Council (LCOs), which, if approved in draft by both Houses of Parliament, insert specified “Matters” into Schedule 5 to the Government of Wales Act 2006, relating to one or more of the 20 “Fields” listed there. These Matters specify areas in which the Assembly can pass legislation, known as Assembly Measures. Under the terms of the Act the Assembly has this power with effect from 7 May 2007, following its reconvening after the elections on 3 May.

2. It is anticipated that as part of this process LCOs will be subject to pre-legislative scrutiny by the National Assembly and by both Houses of Parliament, and the Secretary of State for Wales has been among those who envisage the Welsh Affairs Committee playing key role in this process.¹

3. Because the Act deliberately does not specify the precise nature of this pre-legislative scrutiny, we decided to hold a one-off evidence session to hear the views of the main players involved at each of the various stages of the process. The aim of our inquiry was: to establish the likely number and timing of proposed LCOs anticipated annually; their origins and the procedures to be followed for their consideration; what form proposed LCOs are likely to take and what supporting documentation will be provided; the role of the Secretary of State in their presentation at Westminster; the pre-legislative scrutiny of proposed LCOs at Westminster, and whether pre-legislative scrutiny by the House of Commons and by the House of Lords will be consecutive or concurrent; opportunities for joint working between the Welsh Affairs Committee and committees of the National Assembly; the co-ordination of the National Assembly and parliamentary timetables; and other means by which Matters will be added to Schedule 5 to the Act.

4. We thank the following for their evidence: Nick Ainger MP, Parliamentary Under Secretary of State for Wales, John Williams, Deputy Director, Wales Office, Jane Hutt AM, Business Minister, Welsh Assembly Government, Dr Hugh Rawlings, Director of the Department for Local Government and Culture, Welsh Assembly Government, Rt. Hon. Lord Elis-Thomas AM, Presiding Officer, Aled Eirug, Constitutional Consultant, Adrian Crompton, Head of Members Research and Committee Service, and Jenny Randerson AM, Chair, and Gareth Williams, Clerk, Committee on Standing Orders, National Assembly for Wales. We also express our thanks to Professor Keith Patchett, Emeritus Professor of Law at the University of Wales, who advised us during the course of our inquiry.

¹ *Wales Office Annual Reports 2005 and 2006*, HC 1675-i, Q 28

2 Legislative Competence Orders: proposed procedure

Scope

5. Schedule 5 to the Government of Wales Act 2006 lists 20 “Fields”, or devolved areas of competence, which follow broadly those listed under Schedule 2 to the Government of Wales Act 1998. LCOs operate by adding “Matters” within these “Fields”, thereby extending the law-making powers of the National Assembly without recourse to further primary legislation. LCOs can add to the list of Fields, but only if a function in the Field is exercisable by the Welsh Ministers, the First Minister or the Counsel General.² The Assembly cannot, therefore, propose the addition of a new Field unless other (primary) legislation has already conferred such functions. The legislation enacted by the Assembly under an LCO will be known as an Assembly Measure and may contain any provision within the terms of the Matter as prescribed by the LCO that could be made by an Act of Parliament.³

6. We were told by the Parliamentary Under Secretary of State for Wales that proposed Orders were expected to be “quite focused ... giving the Assembly powers to legislate in a particular area”.⁴ The Chair of the Assembly Committee on Standing Orders agreed; because proposed Orders have to comply with the Act, they will be required to be “relatively specific”, although she felt that “custom and practice will develop which sets out how general and how specific Orders in Council have to be”.⁵ We were also told that the expectation is that proposed Orders will be introduced with specific Measures to be made under them in mind.⁶ However the Government of Wales Act does enable the Welsh Assembly Government, should it wish to do so, to seek more widely-drawn powers through LCOs; as stated the White Paper *Better Governance for Wales*, the powers sought through LCOs might be “something very specific”, “something rather wider”, or “something considerably wider”.⁷ It therefore appears possible, in principle, that the Assembly Government may propose Orders that contain quite extensive powers, if those are considered necessary in order to enable wide-ranging policy objectives to be secured.

Proposed Orders

7. There are three ways in which the National Assembly can formulate a request for enhanced legislative powers: they can be initiated by the Welsh Assembly Government; by Committees of the National Assembly; or by individual Assembly Members who enter a ballot to win the opportunity to propose an Order. How often such ballots are held is a matter for the Assembly, as is, of course, the support the Assembly provides for LCOs

² Government of Wales Act 2006, s.95(2)

³ *ibid*, s. 94(1)

⁴ Q 10

⁵ Q 76

⁶ Qs 3, 52

⁷ *Better Governance for Wales*, June 2005, Cm 6582 para 3.18

emanating from committees or individual Assembly Members. However, the Head of the Members Research and Committee Service at the Assembly told us “It would be a matter for Assembly parliamentary staff to support committees in that way. We have our own legal, clerking and research services, all of which provide support”.⁸

8. If, following pre-legislative scrutiny, a proposed Order is approved by a vote in the Assembly, it then becomes a draft Order. The Presiding Officer told us that, whichever way an Order originates, “there is no question that [the draft Orders] should not have the same status”.⁹

Format and accompanying documentation

9. In a joint memorandum to this Committee, the Parliamentary Under Secretary of State for Wales and the Minister for Assembly Business included examples of the format of a proposed LCO, one of which is published with the written evidence to this Report.¹⁰ In addition to the text of the proposed Order, a short explanatory note and an accompanying memorandum will be provided. The Parliamentary Under Secretary told us:

the proposal covers the scope of the legislation and any other Acts of Parliament that may be affected or would have to be amended as a result of it and gives a general policy background of why the legislation is required, but the important thing is clarifying the appropriateness and the scope of the legislation.¹¹

10. This point was later emphasised by the Presiding Officer, who told us that the purpose of the explanatory memorandum accompanying a proposed LCO was “that it should state clearly that the proposal is competent within the areas laid out in the Act”.¹² The Chair of the Standing Orders Committee of the National Assembly told us that, at the draft Order stage, the accompanying memorandum would need to be more specific as it would have to set out the results of any pre-legislative scrutiny to which the proposed Order had been subject. At this point, the accompanying memorandum “would have to include an explanation of how account has been taken of any recommendations made by other Assembly committees and reports prepared by the Houses of Parliament and the reasons for any significant differences between the draft Order and the proposed Order to which it relates”.¹³

11. Proposed Orders initiated by individual Assembly Members emerge as a result of a ballot. In these cases, the Member concerned will be required to submit the text of their proposed Order as well as an accompanying explanatory memorandum at the time they enter their name for the ballot. The Chair of the Standing Orders Committee of the Assembly told us, referring to the current Assembly arrangements for proposing statutory instruments, that this was “the recognition of our capacity issues in the Assembly. It has

⁸ Q 59

⁹ Q 61

¹⁰ Ev 21

¹¹ Q 7

¹² Q 54

¹³ Q 73

proved problematic to Assembly Members to get a fully developed legislative proposal in a reasonable timescale once their name comes out of the ballot”.¹⁴

Engagement with Whitehall departments

12. Where a proposed Order is likely to affect Whitehall departments it will be important to ascertain early on how these departmental interests are to be taken into account. In the case of a Welsh Assembly Government-proposed Order, consultations will be undertaken by Wales Office officials, for the Secretary of State, and Whitehall. The Minister for Assembly Business told us that in such cases “consultation would have taken place before the proposed Order”.¹⁵ The Parliamentary Under Secretary of State told us that “Whitehall will have to consent to an Order in Council being laid, even for pre-legislative scrutiny, by the Secretary of State, so these will be part of those discussions ... taking place before a proposed Order in Council comes from Cardiff up to Whitehall”.¹⁶ He also told us that the Wales Office was preparing guidance for Whitehall departments on the LCO procedure.¹⁷ In the case of Member-generated LCOs, we were told by the Head of the Members Research and Committee Service of the Assembly, “strictly speaking, it would be a matter for the Member in charge of the proposal to decide how and when they engaged with Whitehall departments”, although he added that the Research and Committee Service would certainly look to provide advice to Members on taking an Order through the Assembly and on facilitating the process.¹⁸ We agree with the Minister for Assembly Business, who told us that the guiding principle in the case of a proposed LCO of whatever origin should be ensuring that Whitehall is consulted at the earliest stage.¹⁹

Pre-legislative scrutiny

13. A proposed LCO, having been initiated by one of the three possible routes described above, may then be subject to pre-legislative scrutiny by both the National Assembly and by Parliament. In the case of the Assembly, this would be undertaken by a committee set up especially for that purpose, and the decision as to whether or not to refer it will lie with the Assembly’s Business Committee. The Business Committee may decide to disapply this procedure, in which case the draft LCO goes before the Assembly for formal consideration without an accompanying Assembly committee report. However, if it is so referred, any subsequent recommendation by the Assembly committee may result in the Order being amended (by its proposer, depending on its origin) before being submitted to the Assembly for formal consideration as a draft Order. In the case of a proposed Order emanating from an Assembly committee, the presumption is that it has already been scrutinised by the committee.

¹⁴ Q 81

¹⁵ Q 6

¹⁶ Q 14

¹⁷ Q 6

¹⁸ Q 61

¹⁹ Q 6

14. A similar process will be followed in the House of Commons, where the Secretary of State for Wales will decide whether to refer a proposed Order for pre-legislative scrutiny.²⁰ The clear expectation is that proposed Orders will be subject to pre-legislative scrutiny by both Houses prior to the formal consideration of a subsequent draft Order by the Assembly. As is the case in the Assembly, however, it is at least technically possible that a proposed Order would not be subject to pre-legislative scrutiny at Westminster; equally, there could be instances where pre-legislative scrutiny is conducted only by the Assembly or at Westminster.

The role of the Welsh Affairs Committee and opportunities for joint working

15. In earlier evidence to this Committee, the Secretary of State told us that he thought the Welsh Affairs Committee was in “pole position” to conduct pre-legislative scrutiny.²¹ Similarly, the Parliamentary Under Secretary of State told us that unless they were particularly urgent, “we are going to be offering [the Welsh Affairs Committee] the opportunity for pre-legislative scrutiny on every Order in Council”.²²

16. While we welcome the opportunity to be involved in the pre-legislative scrutiny process of Legislative Competence Orders, we do not necessarily agree that the Welsh Affairs Committee should have “a monopoly over this important scrutiny work” - which the House of Lords Select Committee on the Constitution noted was the general assumption.²³ We note the Parliamentary Under Secretary of State’s acknowledgement that “it is for the Committee to decide which Orders in Council it wants to scrutinise”, and maintain that in some circumstances there is an argument for the establishment of *ad hoc* committees of the House to be established specifically for this purpose, as will be the case in the National Assembly.²⁴

17. The proposed procedure also offers scope for the joint scrutiny of proposed LCOs by the appropriate Assembly committee and the Welsh Affairs Committee, with each committee publishing its own report. In written evidence to this Committee, Cymru Yfory / Tomorrow’s Wales speculated about such joint working:

There have been suggestions of continuing the existing practice of joint sittings to scrutinise legislative proposals emanating from the Assembly or Assembly Government. However, a continuation of that practice will risk the sort of confusion of responsibility that concerns us.²⁵

Such an observation failed to acknowledge the effective and unproblematic joint working between this Committee and Welsh Assembly committees which has already taken place in recent times.

²⁰ Q 27

²¹ *Wales Office Annual Reports 2005 and 2006*, HC 1675-i, Q 28

²² Q 24

²³ 8th Report by the House of Lords Select Committee on the Constitution, Session 2005-06, *Government of Wales Bill*, para 22

²⁴ Q 22

²⁵ Ev 26

18. We welcome the opportunities provided for working jointly with Assembly committees in the scrutiny of proposed LCOs, subject to the comments elsewhere in this Report concerning their anticipated number and timing, whilst of course we acknowledge the Welsh Affairs Committee's primary responsibility to inquire into Government policy as it affects Wales. We are keen to ensure that we retain flexibility in our own timetable of inquiries and we believe it is very appropriate that as elected representatives of the people of Wales we have this central role .

19. While we welcome the opportunity for this Committee to scrutinise proposed LCOs, we agree with the Parliamentary Under Secretary of State for Wales' comment that there is a balance to be struck, and that this Committee needs to consider the effect it could have on its existing programme of inquiries.

20. We also note that in conducting pre-legislative scrutiny of LCOs, we may need to draw on additional legal advice.

The Welsh Grand Committee

21. In their written memorandum, the Parliamentary Under Secretary of State and the Minister for Assembly Business foresaw a role in certain circumstances for the Welsh Grand Committee, to consider the pre-legislative scrutiny committee's report on a proposed Order:

if proposals were extensive, complex or of considerable political interest it may be necessary for the Welsh Grand Committee to be convened to debate that report.²⁶

22. The Parliamentary Secretary emphasised this point in evidence:

I think there is a role for the Welsh Grand Committee where you have particularly complex or ... contentious Orders in Council and, if [the pre-legislative scrutiny committee] made a recommendation in its report that perhaps this is a matter that should be debated in the Welsh Grand Committee then certainly I, as a Minister, would have no problem with that.²⁷

23. We agree with the Parliamentary Under Secretary of State and with the Business Minister that, in cases where a proposed Order raises complex legal issues, has wide implications or is politically controversial, it may be appropriate for it also to be scrutinised by the Welsh Grand Committee, following its scrutiny by the Welsh Affairs Committee or by another committee of the House.

Pre-legislative scrutiny by the House of Lords

24. Whether and how the House of Lords decides to conduct pre-legislative scrutiny of proposed LCOs is not of course a matter for this Committee. The Assembly's Standing Orders permit the Assembly Committee to proceed without seeing the parliamentary reports if not reasonably practicable. However if the Assembly is to take full account of

²⁶ Ev 19

²⁷ Q 33

parliamentary scrutiny it obviously will need to consider any reports of parliamentary committees before it completes its work.

25. In order for the process to work effectively, it will be crucial to co-ordinate the timetables of the Assembly and Parliament. The Presiding Officer told us:

we do need to have a number of our staff in the Commission to be collaborating with officials here in Westminster in both Houses, and that does mean collaboration with those with the responsibility for organising business ... on both Governments' sides ... so that we make the best possible use of time and the best possible use of parliamentary windows here.²⁸

26. **We recommend that the UK Government and the National Assembly give further consideration to the means by which the timetables of the National Assembly, the House of Commons and the House of Lords can be most effectively co-ordinated for the consideration of LCOs. We agree with the House of Lords Select Committee on the Constitution that pre-legislative scrutiny in the Commons and the Lords should be concurrent rather than consecutive, and that the work of one House should complement rather than duplicate the work of the other.**²⁹

Reconsideration

27. When pre-legislative scrutiny has been completed, the reports of House of Commons, House of Lords and National Assembly committees will be published and therefore available to the originator of a proposed Order at the reconsideration stage, before the Order is submitted to the Assembly as a draft Order for formal consideration. However, these reports may contain different conclusions. **We note that it is a matter for the Assembly, and in particular for the originator of the proposed Order, how to take into account any differing and possibly competing recommendations contained in reports following the pre-legislative scrutiny of a proposed Order.**

28. If a Welsh Assembly Government draft Order is not approved by a vote in the Assembly, it may be re-introduced in an amended form. We were told that in such cases it is for the Presiding Officer to judge how close an amended draft Order is to the initial proposal, and so whether or not the process of pre-legislative scrutiny would need to be repeated.³⁰ Should a Member-proposed draft Order not be approved by a vote in the Assembly, the draft Order falls and the Standing Orders prohibit a similar draft Order from being proposed in the following six months.³¹

Laying a draft Order in Parliament

29. If approved by a vote in the Assembly, the First Minister then writes to the Secretary of State for Wales, who decides whether or not to lay the draft Order before Parliament.

²⁸ Q 69

²⁹ 8th Report by the House of Lords Select Committee on the Constitution, Session 2005–06, *Government of Wales Bill*, para 24; Q 29

³⁰ Q 67

³¹ Qs 67, 88

Within 60 days, the Secretary of State must either lay the draft Order or write to the First Minister giving reasons for refusing to do so.

30. The memorandum submitted jointly by the Parliamentary Under Secretary of State and the Business Minister of the Assembly notes:

In the normal course of events, as far as Welsh Assembly Government proposals are concerned, agreement between the Welsh Assembly Government and the UK Government could be expected to be reached on the final draft Order before it was considered by the Assembly.³²

31. This refers specifically, of course, to Welsh Assembly Government proposals. Although, in any event, the decision as to whether to lay a draft Order before Parliament is for the Secretary of State, it has not been made clear to us whether the same process of seeking advance agreement would apply to proposed Orders originating from Assembly committees or from individual Assembly Members.

32. Should the Assembly approve a draft Order which has not been subject to pre-legislative scrutiny by an Assembly committee, the Secretary of State is able to invite Parliamentary scrutiny at that stage, before deciding whether it should be laid before Parliament.³³ This process would have to be completed within the statutory 60 days within which the Secretary of State has either to lay it before Parliament or write to the First Minister with reasons for not doing so, which again emphasises the importance of timetabling and co-ordination referred to above. However the general expectation is that pre-legislative scrutiny would already have been undertaken in respect of proposed Orders, so it would not be necessary to repeat this process when it comes to the draft Order, even if it has since been modified.³⁴

Accelerated procedure

33. As noted above, there is no absolute requirement for pre-legislative scrutiny of proposed Orders either by Parliament or by the Assembly. This is something which is subject to the decisions of the Secretary of State and the Assembly Business Committee, and scope exists for pre-legislative scrutiny to be dispensed with if a matter is “particularly urgent” or purely technical.³⁵ Further, the Assembly’s Standing Orders allow it to consider a proposed Order in cases where it has been referred to an *ad hoc* Assembly committee, but before that committee has reported. The Chair of the Assembly Committee on Standing Orders told us that this was “essentially to allow Government to get its business through and to ensure that a particular committee cannot hold the ... legislation up unreasonably”.³⁶ However, in evidence we were told by the Presiding Officer that the strong expectation would be that pre-legislative scrutiny would be “the order of the day” and that its abandonment should be “very exceptional”.³⁷ This was strongly supported by the Chair of

³² Ev 20

³³ *ibid*

³⁴ Qs 35–36

³⁵ Q 24

³⁶ Q 78

³⁷ Q 62

the Assembly Committee on Standing Orders, who told us that pre-legislative scrutiny had been built in “as a fundamental part of the process”, because it “makes much better law”.³⁸ **We fully support the view of the witnesses before this Committee that the presumption should be that proposed LCOs should be subject to pre-legislative scrutiny.**

Consideration of draft Orders at Westminster

34. The Parliamentary Under Secretary of State told us that:

we are looking for the development of a convention that, in principle, Orders in Council will be supported ... the thrust of the Government of Wales Act [is] that these powers, when requested, as long as they are appropriate, within scope and not *ultra vires* ... will be granted. ... the principle will be that these requests will be supported as long as they are appropriate, within scope, do not affect other Acts of Parliament or go outside the devolution settlement.³⁹

35. In earlier evidence to this Committee, the Secretary of State said that he saw this as a “commonsense partnership”:

I see the likely trajectory as being that the Assembly bids would get proper consideration and would invariably be taken through, not rubber-stamped, but invariably taken through because it is in the spirit of the Act.⁴⁰

36. Once laid, a draft Order will be subject to the affirmative resolution procedure at Westminster, and will be debated both in the House of Commons and in the House of Lords. As the memorandum submitted by the Parliamentary Under Secretary of State and the National Assembly’s Business Manager points out, “at this stage the Order in Council will not be amendable as both the National Assembly and Parliament will need to approve identical text.”⁴¹

37. If the Secretary of State refuses to lay a draft Order before Parliament, the reasons for not doing so are set out in a letter to the First Minister, who then notifies the Assembly. If approved by both Houses, the draft Order is then referred to the Privy Council to be made.⁴² **If there have been substantive changes between the proposed Order and the draft Order laid before Parliament, we would expect the Government to allow sufficient time for further parliamentary scrutiny if this Committee or others wished to conduct it.**

38. However, the question arises as to whether this part of the process might be more difficult in the event of there being administrations at Cardiff and at Westminster of different political persuasions. The Presiding Officer told us that he was “not much entertained by this idea that the roof will fall in both in Westminster and in Cardiff Bay if

³⁸ Q 82

³⁹ Q 12

⁴⁰ *Wales Office Annual Reports 2005 and 2006*, HC 1675-i, Q 29

⁴¹ Ev 20

⁴² *ibid*

there were changes of administration politically in either place”.⁴³ He continued, “this has to work and has to be seen to be working. ... The way to make it work is to be open about these political pressures that any constitutional system generates”. The Chair of the National Assembly Committee on Standing Orders told us that she would “expect a Secretary of State who had concerns to have raised them much earlier on through the regular channels of government-to-government communication”.⁴⁴ The question remains, however, of what would happen were a Secretary of State of a different political persuasion to that of the Welsh Assembly Government attempt to – as a member of this Committee put it – “throw a spanner in the works”.⁴⁵

39. It is important that Members other than members of the Welsh Affairs Committee have an opportunity to participate in the scrutiny of Orders in Council. In the case of a proposed Order which is taken by the Welsh Affairs Committee for pre-legislative scrutiny, any Member may make representations to the Committee. Similarly, when an Order comes before the House in draft form, either to a committee or on the floor of the House, then every Member has the right to attend and to speak.⁴⁶

40. This Committee’s First Report of Session 2005–06, *Government White Paper: Better governance for Wales* recommended that, in principle, all draft Orders in Council should be debated on the floor of the House.⁴⁷ However, this was not supported by Government in its response:

The Government believes business managers may wish to consider on a case-by-case basis the right mechanism to be employed for scrutiny in each case.⁴⁸

41. In evidence, the Parliamentary Under Secretary of State anticipated that more substantial draft Orders would be taken on the floor of the House, although he emphasised that this was a matter for the House’s business managers through the usual channels.⁴⁹ **We re-iterate our view that the debate of draft Orders should be undertaken on the floor of the House.**

Draft Orders: representing the Assembly’s interests at Westminster

42. Another question which arose during our evidence was how the Assembly’s interests would be represented at Westminster following the laying of a draft Order before Parliament by the Secretary of State. The Presiding Officer told us that it had been suggested to him that “one of the [National Assembly’s] Commission staff, who would have been responsible for the original proposal as it travelled through the many steps in the

⁴³ Q 66

⁴⁴ Q 83

⁴⁵ Q 45

⁴⁶ Q 31

⁴⁷ Welsh Affairs Committee, 1st Report of Session 2005–06, *Government White Paper: Better governance for Wales* (HC 551), para 120

⁴⁸ Welsh Affairs Committee, 3rd Special Report of Session 2005–06, *Government response to the Committee’s 1st Report of Session 2005–06* (HC 839), p 9

⁴⁹ Q 41

Assembly, would actually follow its progress through [Westminster]”.⁵⁰ The Presiding Officer told us:

I do think it is important that we ensure ... that the Clerk of the original committee that took the [proposed Order] through and ... who understands its context could be able to work alongside officials in [the Commons and the Lords] when the rest of the processes are gone through because I do not think it would be appropriate to leave things there.⁵¹

43. We recommend that the authorities of the National Assembly explore the possibility of making appropriate arrangements to represent the interests of the originator of a draft Order as it passes through its Parliamentary stages.

The expected number and timing of LCOs

44. The Parliamentary Under Secretary of State estimated that there would be “four or five” LCOs annually “evenly paced throughout the year”, which he described as “manageable”.⁵² He also described as “unattainable” estimates he had seen of up to 30 LCOs a year. We agree with both these assessments, and would be very concerned if anything approaching the upper estimate was proposed. The Parliamentary Under Secretary also indicated that pre-legislative scrutiny was expected to take between three and six months; “certainly six months would be the maximum time”.⁵³ If there are to be four or five LCOs a year, this timeframe seems to us reasonable as far as Westminster is concerned.

Adding Matters by primary legislation

45. LCOs essentially provide the opportunity for direct initiatives by the devolved institutions in Wales: the Welsh Assembly Government, the National Assembly of Wales, its committees and individual Assembly Members. The possibility of adding Matters to Schedule 5 to the Government of Wales Act 2006 by primary legislation made at Westminster continues after the provisions of the 2006 Act come into effect in May 2007. Two Bills currently before Parliament, the Local Government and Public Involvement in Health Bill and the Further Education and Training Bill both do so, and we understand that the Government intends to continue to add Matters by the inclusion of ‘framework powers’ in UK Government Bills. This may be the usual way in which the Assembly acquires significant powers.

46. We are concerned that continuing to use primary legislation to extend the powers of the National Assembly (in a parallel procedure to adding Matters by way of Legislative Competence Orders) will mean that Matters introduced in this way will escape the detailed arrangements for pre-legislative scrutiny put in place for LCOs. It is unlikely that a single clause in a wider Bill would be subject to the same degree of scrutiny as a draft LCO,

⁵⁰ Q 68

⁵¹ Q 61

⁵² Q 44

⁵³ Q 43

especially if the Bill is long and complex and the relevant clause appears towards the end of it. It could well be that such clauses will not be of sufficient concern to the official opposition to receive separate attention in formulating timetables under programme orders. We are also concerned that the use of primary legislation denies the opportunity for joint working between the Welsh Affairs Committee and an Assembly committee in the pre-legislative scrutiny of proposed LCOs.

47. In a supplementary note on the use of framework powers, the Secretary of State stated that Parliament will be able to scrutinise framework powers in Bills by bringing forward amendments.⁵⁴ The reality may prove to be disappointing in this respect. Such clauses, which typically appear in the later parts of Bills, tend to receive less attention than substantive policy clauses. An additional difficulty may arise in that, through absence of appropriate formal channels, Members at Westminster may not be able to ascertain or receive timely information concerning the views of the National Assembly on such provisions in order to take those into account when considering a bill. However, the new procedures for the committee stages of public bills means that the National Assembly, or individual Assembly Members or other stakeholders would be able to overcome this difficulty to an extent by submitting evidence to the relevant Public Bill Committee.

48. Given that the inclusion of generalised framework powers in UK Government Bills is a less protracted way of adding to the powers of the National Assembly than is the LCO process, it may turn out to be the case that this latter procedure is used more by Assembly committees and individual Assembly Members, with the Welsh Assembly Government preferring to rely on provision in UK Government Bills. However, provision by primary legislation will be determined principally by the UK Government's legislative priorities, and whether framework powers for the National Assembly will be included in Bills, and their nature and extent, will be the subject of negotiation between the sponsoring department and the Welsh Assembly Government.

49. In direct contrast to the specific and focused nature of LCOs which we were told in evidence we could expect, the primary legislative route could be used to add Matters even where no particular Assembly Measure is in immediate contemplation.⁵⁵ **We are concerned that to continue to add Matters by primary legislation could therefore be a device for a general, rather than a specific, extension of Assembly powers, which at the same time negates the opportunity for specific and detailed pre-legislative scrutiny either by a committee of the National Assembly or by the Welsh Affairs Committee.**

Transparency

50. The Presiding Officer told us in evidence that “any protocol should start by stating that it is an intention that these processes should be as open and transparent as possible”.⁵⁶ It is certainly helpful to the monitoring of the process that the Welsh Assembly Government sets out its proposed legislative programme at the beginning of a Session in an annual

⁵⁴ Ev 27

⁵⁵ Qs 3, 52

⁵⁶ Q 55

statement in which its proposals for Measures and any LCOs that may be required are specified. As the Business Minister of the Assembly told us,

We would anticipate the Welsh Assembly Government being able to make an annual statement very soon after the election in May 2007 ... It would be a strategic and legislative programme statement, a Queen's Speech for Wales.⁵⁷

51. In evidence, the Presiding Officer told us “because this is a new process ... the protocols do have to be as understandable as possible”.⁵⁸ However, he acknowledged that “there is a danger that the procedures can be vague rather than transparent”.⁵⁹ In part, a certain ambiguity at the beginning may be unavoidable because, as the Chair of the Assembly Committee on Standing Orders told us:

What we have tried to do is to produce Standing Orders which are as simple as possible in order to be transparent and accessible and also have a great deal of what we have called ‘white space’ between the lines.⁶⁰

52. In written evidence to this Committee, Cymru Yfory / Tomorrow's Wales emphasised the importance of transparency:

Cymru Yfory ... hopes that these procedures will be clear and comprehensible in themselves, and interact in a clear and comprehensible way with procedures adopted by the Secretary of State for Wales, the Welsh Assembly Government and the National Assembly. They should have the effect of ensuring, to the maximum degree possible, that it is possible for those outside government to understand who is responsible for taking policy decisions about any particular matter.⁶¹

Equally so, Cymru Yfory should have included the procedures at Westminster.

53. As more and more Matters are added to Schedule 5 to the Act – at unpredictable times and by various methods – it will become increasingly important that a consolidated list of Fields is maintained and published. Consideration also needs to be given about the form that the listing of the Matters in each Field should take; it needs to be logical rather than chronological and it may also be important for the statutory origin of Matters to be indicated (where appropriate), as their interpretation may be affected by the context of the Act by which they are added. This, of course, is the responsibility of the Assembly, but **we are pleased to note the Presiding Officer's comment that a consolidated list of Fields will be published on the Assembly's website and will be updated regularly.**⁶²

54. As Matters are added in a fragmented way, it is important that the coherence of Schedule 5 is maintained. We fully expect that parliamentary select committees interested in devolution will keep a watching brief on the way in which Schedule 5 develops, and

⁵⁷ Q 20

⁵⁸ Q 55

⁵⁹ Q 55

⁶⁰ Q 72

⁶¹ Ev 26, para 3

⁶² Q58

therefore how devolution is evolving in Wales. **We agree with the Presiding Officer's comment that the process by which the legislative powers of the National Assembly are enhanced should be as open and transparent as possible, and that this should be borne in mind as practice and procedure develops.**

Conclusions and recommendations

1. We welcome the opportunities provided for working jointly with Assembly committees in the scrutiny of proposed LCOs, subject to the comments elsewhere in this Report concerning their anticipated number and timing, whilst of course we acknowledge the Welsh Affairs Committee's primary responsibility to inquire into Government policy as it affects Wales. We are keen to ensure that we retain flexibility in our own timetable of inquiries and we believe it is very appropriate that as elected representatives of the people of Wales we have this central role. (Paragraph 18)
2. While we welcome the opportunity for this Committee to scrutinise proposed LCOs, we agree with the Parliamentary Under Secretary of State for Wales' comment that there is a balance to be struck, and that this Committee needs to consider the effect it could have on its existing programme of inquiries. (Paragraph 19)
3. We also note that in conducting pre-legislative scrutiny of LCOs, we may need to draw on additional legal advice. (Paragraph 20)
4. We agree with the Parliamentary Under Secretary of State and with the Business Minister that, in cases where a proposed Order raises complex legal issues, has wide implications or is politically controversial, it may be appropriate for it also to be scrutinised by the Welsh Grand Committee, following its scrutiny by the Welsh Affairs Committee or by another committee of the House. (Paragraph 23)
5. We recommend that the UK Government and the National Assembly give further consideration to the means by which the timetables of the National Assembly, the House of Commons and the House of Lords can be most effectively co-ordinated for the consideration of LCOs. We agree with the House of Lords Select Committee on the Constitution that pre-legislative scrutiny in the Commons and the Lords should be concurrent rather than consecutive, and that the work of one House should complement rather than duplicate the work of the other. (Paragraph 26)
6. We note that it is a matter for the Assembly, and in particular for the originator of the proposed Order, how to take into account any differing and possibly competing recommendations contained in reports following the pre-legislative scrutiny of a proposed Order. (Paragraph 27)
7. We fully support the view of the witnesses before this Committee that the presumption should be that proposed LCOs should be subject to pre-legislative scrutiny. (Paragraph 33)
8. If there have been substantive changes between the proposed Order and the draft Order laid before Parliament, we would expect the Government to allow sufficient time for further parliamentary scrutiny if this Committee or others wished to conduct it. (Paragraph 37)
9. We re-iterate our view that the debate of draft Orders should be undertaken on the floor of the House. (Paragraph 41)

10. We recommend that the authorities of the National Assembly explore the possibility of making appropriate arrangements to represent the interests of the originator of a draft Order as it passes through its Parliamentary stages. (Paragraph 43)
11. The Parliamentary Under Secretary of State estimated that there would be “four or five” LCOs annually “evenly paced throughout the year”, which he described as “manageable”. He also described as “unattainable” estimates he had seen of up to 30 LCOs a year. We agree with both these assessments, and would be very concerned if anything approaching the upper estimate was proposed. The Parliamentary Under Secretary also indicated that pre-legislative scrutiny was expected to take between three and six months; “certainly six months would be the maximum time”. If there are to be four or five LCOs a year, this timeframe seems to us reasonable as far as Westminster is concerned. (Paragraph 44)
12. We are concerned that to continue to add Matters by primary legislation could therefore be a device for a general, rather than a specific, extension of Assembly powers, which at the same time negates the opportunity for specific and detailed pre-legislative scrutiny either by a committee of the National Assembly or by the Welsh Affairs Committee. (Paragraph 49)
13. We are pleased to note the Presiding Officer’s comment that a consolidated list of Fields will be published on the Assembly’s website and will be updated regularly. (Paragraph 53)
14. We agree with the Presiding Officer’s comment that the process by which the legislative powers of the National Assembly are enhanced should be as open and transparent as possible, and that this should be borne in mind as practice and procedure develops. (Paragraph 54)

Formal Minutes

Wednesday 9 May 2007

Members present:

Dr Hywel Francis, in the Chair

Mr Stephen Crabb

Mr David Jones

Mrs Siân James

Mr Albert Owen

Hywel Williams

Mark Williams

Draft Report (Legislative Competence Orders in Council), proposed by the Chairman, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 54 read and agreed to.

Summary agreed to.

Resolved, That the Report be the Second Report of the Committee to the House.

Ordered, That the Chairman make the Report to the House.

[Adjourned until Monday 14 May at 2 pm]

List of witnesses

Tuesday 19 December 2006

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Rt Hon Lord Dafydd Elis-Thomas AM , Presiding Officer, Mr Aled Eirug , Constitutional Consultant, Mr Adrian Crompton , Head of Members Research and Committee Service, National Assembly for Wales	Ev 8
Ms Jenny Randerson AM , Chair, Committee on Standing Orders, Mr Gareth Williams , Clerk, Committee on Standing Orders, National Assembly for Wales	Ev 14

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Reports from the Welsh Affairs Committee since 2005

The following reports have been produced by the Welsh Affairs Committee in the 2005 Parliament.

Session 2005–06

First Report	Government White Paper: Better Governance for Wales	HC 551
Second Report	Proposed Restructuring of the Police Forces in Wales	HC 751
Third Report	Energy in Wales	HC 876-I
Oral and Written Evidence	Energy in Wales	HC 876-II
Fourth Report	Future of RAF St Athan	HC 1129
Fifth Report	Current Restructuring of the Police Forces in Wales	HC 1418
Oral and Written Evidence	NHS Dentistry in Wales	HC 771-i
First Special Report	Government Response to the Committee's Second and Third Reports of Session 2004–05, Manufacturing and Trade in Wales and Public Services Ombudsman (Wales) Bill	HC 433
Second Special Report	Government Response to the Committee's Fourth Report of Session 2004-05, Police Service, Crime and Anti-Social Behaviour in Wales	HC 514
Third Special Report	Government Response to the Committee's First Report of Session 2005-06, Government White Paper: Better Governance for Wales	HC 839
Fourth Special Report	Government Response to the Committee's Second Report of Session 2005-06, Proposed Restructuring of the Police Forces in Wales	HC 1431
Fifth Special Report	Government Response to the Committee's Third Report of Session 2005-06, Energy in Wales	HC 1656
Sixth Special Report	Government Response to the Committee's Fourth Report of Session 2005-06, Future of RAF St Athan	HC 1657
Seventh Special Report	Government Response to the Committee's Fifth Report of Session 2005-06, Current Restructuring of the Police Forces in Wales	HC 1695

Session 2006-07

First Report	Work of the Committee in 2005-06	HC 291
Second Report	Legislative Competence Orders in Council	HC 175

Oral evidence

Taken before the Welsh Affairs Committee

on Tuesday 19 December 2006

Members present:

Dr Hywel Francis, in the Chair

Nia Griffith
Mrs Siân James
Mr David Jones

Hywel Williams
Mark Williams

Witnesses: **Nick Ainger**, a Member of the House, Parliamentary Under Secretary of State for Wales, and **Mr John Williams**, Deputy Director, Wales Office; and **Ms Jane Hutt**, Assembly Member, Business Minister, and **Dr Hugh Rawlings**, Director of Department for Local Government and Culture, Welsh Assembly Government, gave evidence.

Q1 Chairman: Good morning, *bore da*, and welcome to the Welsh Affairs Select Committee. Before I ask you to introduce yourselves for the record, could I introduce our specialist adviser who is Professor Keith Patchett, emeritus professor of law at the University of Wales. Ms Hutt and Mr Ainger, could you introduce yourselves and your colleagues please.

Nick Ainger: Nick Ainger, Parliamentary Under Secretary of State for Wales. This is John Williams, one of our officials who has been dealing with the Government of Wales Act.

Ms Hutt: Jane Hutt, the Business Minister for the Welsh Assembly Government and this is Dr Hugh Rawlings, who is the Director of Department for Local Government and Culture.

Q2 Chairman: Thank you very much. Could I begin by simply pointing out that we have a great deal of work to do today and I am sure you will not be offended if I ask you to be brief and to the point. We would not wish everyone to have a go at every question, but please use your judgment. Could I begin by asking a question about the Legislative Competence Orders. If one Legislative Competence Order dealt with more than one distinct aspect of policy, incorporating several unrelated changes, there would be a risk that a lack of parliamentary support for one area would result in the loss of the whole Order. Will each policy proposal, therefore, be supported by a separate Legislative Competence Order?

Nick Ainger: Basically yes. We do not envisage there being Orders in Council coming forward covering a whole range of issues. Clearly it would be extremely difficult for you in terms of pre-legislative scrutiny and it would also be difficult in terms of agreements throughout Whitehall. As you indicated, it would be quite possible that in perhaps one of those areas there was disagreement with a Whitehall department and the whole Order was

lost. In terms of scrutiny, bearing in mind the hour and a half during which the final draft Order will be scrutinised in committee or on the floor of the House, it would be far better if it was a focused request rather than one which covered a range of topics.

Q3 Chairman: Do you anticipate that proposals for, what we can now call in a short form, LCOs will be made without a specific measure in mind?

Nick Ainger: I certainly would not envisage that. The whole purpose of the Order in Council process is to allow the Assembly to pass laws and make measures with a specific purpose in mind in terms of furthering a particular policy development, so no, this idea that there would be a sort of portmanteau of Orders in Council where things could be slotted in in the future, we do not envisage that happening. Each Order in Council will be accompanied by a policy statement, specifying the areas where legislation is required.

Q4 Mr Jones: Minister, in terms of procedure, how do you envisage that the procedure for adding a new Field will differ from that for adding a new matter to an existing Field or for varying a Field?

Nick Ainger: Well, in terms of a new Field, and this is in Schedule 5, this would have to be where executive functions had been passed to an Assembly minister, either through a transfer of functions order or through a particular piece of legislation which had gone through the UK Parliament. It would then follow that there would then be an Order in Council process, if it was required to pass legislation, requesting legislative powers for that minister to have, following him acquiring these new executive functions, so it would be the same process that would bring forward these new functions and new Fields rather than the matters which most of the Orders in Council will be bringing forward to add under the Fields in Schedule 5.

Q5 Mr Jones: So the process would be the same?

Nick Ainger: Pretty much the same, yes.

Q6 Mrs James: What arrangements are being made between the Wales Office and the Welsh Assembly Government to facilitate the preparation of proposed Orders which would affect Whitehall departments and how will departmental interests be ascertained and taken into account in the case of committee- and Member-generated proposals?

Ms Hutt: I think that is very important, that if the Welsh Assembly Government forwarded a proposed committee or indeed Assembly Member Order, for example, to the Secretary of State, then the Secretary of State would consult Whitehall on the proposal. Clearly, in relation to a Welsh Assembly Government proposal for an Order in Council, that consultation would have taken place before the proposed Order, but it could happen if it was an Assembly Member or a committee proposal and it could happen at the proposed Order stage and possibly the Welsh Assembly Government might intend to support it or after the Assembly had approved a draft Order and then the First Minister had sent it formally to the Secretary of State. I think it is then about ensuring that Whitehall is consulted at the earliest stage in terms of the routes that are taken.

Nick Ainger: Could I add, Dr Francis, that in fact we are now in the process of developing this guidance for all Whitehall departments and we are also organising seminars for other departments in Whitehall so that they are familiar with these new procedures and that will obviously ensure that Whitehall departments, who do not necessarily have regular contact with our Office in terms of taking through legislation, are aware of this process and that they have a role to play in giving advice and reaching agreement before a proposed Order in Council is laid.

Q7 Mark Williams: What information and documentation do you envisage will accompany proposed and draft Legislative Competence Orders?

Nick Ainger: I assume that the memorandum was circulated with two draft memoranda or statements of policy intent, one covering the Public Services Ombudsman,¹ which we have basically laid it out as if that piece of legislation has not been enacted and the same, I think, with the Transport Bill as well. If you look at those, the proposal covers the scope of the legislation and any other Acts of Parliament that may be affected or would have to be amended as a result of it and gives a general policy background of why the legislation is required, but the important thing is clarifying the appropriateness and the scope of the legislation. I do not know if any colleagues would like to comment on the content of that, but certainly we feel that that is a comprehensive explanation and background support to the requirement for the Order in Council.

Q8 Hywel Williams: In terms of parliamentary scrutiny, will committees here be provided with information and perhaps documentation in regards to proposed measures, giving an early indication of the likely extent to which the existing law of England or Wales might be significantly amended, repealed or replaced?

Nick Ainger: In terms of measures?

Q9 Hywel Williams: Yes.

Nick Ainger: Well, no, because this process comes before any major work and certainly any drafting of any measures can take place, but the supportive memorandum for the Order in Council would certainly touch on the issues that, if a proposed Order in Council to enable the Assembly to bring forward measures were going to affect other Acts of Parliament, then that would clearly be flagged up and would have been part of the discussion that Mrs James referred to with other government departments as well, so that would have all been clarified before the proposed Order in Council comes to you for pre-legislative scrutiny, but it would certainly be included in the memorandum which will accompany the proposed Order in Council.

Q10 Mrs James: In any protocol governing the preparation of Legislative Competence Orders, which I shall call 'LCOs' from now on, should guidance be provided as to the level of generality in which new powers are expressed?

Nick Ainger: As I said before, and perhaps this is for Jane Hutt to respond to as well, we would hope that we are not looking at a generality, a sort of broad brush of Orders in Council, but we are looking at quite focused Orders in Council giving the Assembly powers to legislate in a particular area that they have requested and which would be set out in the Order in Council. In terms of a protocol, I am not quite sure what you are referring to there.

Q11 Mrs James: Well, extended powers will be conferred in a range of ways, either defining the matters affected in broad terms or expressing them very specifically. I suppose what we are looking at is whether we should have some sort of written guidance or some outline of how you would like things to be prepared or put forward.

Ms Hutt: This does come back to the earlier point that Mrs James made. It does go back to us seeking to have, or I hope or presume that we will be moving forward to have, powers for a purpose in terms of these new opportunities and I would imagine that Orders could be brought forward, for example, where we did not have the detail, but there may have been a review in a policy area that the Welsh Assembly Government has been undertaking, or indeed that a committee might have undertaken, and it would seek the powers through an Order in Council, but we might not have got to the point of the full detail of the proposed measure before we knew whether Parliament was willing to agree to making them

¹ Ev 21–23

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necessary legislative competence. I think it again goes back to your protocol and the Secretary of State talked in our Queen's Speech debate a lot about developing a convention and presumption that they would be supporting Orders in Council, the presumption to support rather than not, but the key test is appropriateness. I think this is when both the First Minister and the Secretary of State came and gave evidence in November and the issue about appropriateness, scope, *vires* and all those issues are surely going to be the main guideline to the kind of protocol you are talking about.

Q12 Mr Jones: Is it likely a protocol will be developed and published?

Nick Ainger: I do not see at this stage that there is a requirement for that. I think what we have said and what the Secretary of State has said has been quite clear, that we are looking for a development of a convention that, in principle, Orders in Council will be supported and that is the thrust of the Government of Wales Act, that these powers, when requested, as long as they are appropriate, within scope, not *ultra vires* and so on, will be granted. The Secretary of State has spoken of the idea of a convention which basically says that the principle will be that these requests will be supported as long as they are appropriate, they are within scope, they do not affect other Acts of Parliament or go outside the devolution settlement. With the convention, clearly we are working on, as I indicated earlier, the guidance for other government departments as well.

Q13 Mrs James: Just to expand on that a bit further, it is likely that parliamentary committees would wish to see express provisions included under certain circumstances, for example, authorising significant invasions of individual rights, such as compulsory powers of entry or inspection. Are you imagining that those protocols will actually surround that sort of inclusion, specifics that committees outside this loop really might want us to include?

Nick Ainger: Sorry, you are referring to things like the Human Rights Committee or that sort of issue?

Q14 Mrs James: Yes.

Nick Ainger: Clearly, when the Order in Council is being discussed and developed within Whitehall, human rights issues will be one of those things which will have to be resolved before consent is given because Whitehall will have to consent to an Order in Council being laid, even for pre-legislative scrutiny, by the Secretary of State, so these will be part of those discussions and agreements which will be taking place before a proposed Order in Council comes from Cardiff up to Whitehall.

Q15 Mrs James: I think what I was perhaps trying to get at are not the generalities again because human rights are something which would be built in automatically and there are certain provisions which would have to be included, but there might, for example, be something coming from a

committee which would have caused in the committee a certain concern or an action which they then, outside of this loop or outside of this process, might specifically request which had not been requested before. Are you quite flexible around that?

Nick Ainger: I am trying to think, other than the Human Rights Committee, what committees you are talking about.

Q16 Mrs James: Well, I talked about compulsory powers of entry or inspection and it could be not just on the human rights aspect, but maybe I have wandered off too far.

Nick Ainger: If there are contentious issues which have not been flagged up by other government departments before the proposed Order is laid, but during your pre-legislative scrutiny these issues then do come to light, then that is, if you like, the beauty of the process in that then amendments can be made if it is accepted that there is a particular problem. When you and the equivalent Assembly committee make your reports following the pre-legislative scrutiny and this is an issue which is flagged up, it would be sensible for the Assembly Government to then amend the Order in Council before they then laid it before the Assembly and then before it comes up in its draft form here to be laid before Parliament. If it is not addressed in the first consultation with the government departments, then the beauty of the pre-legislative scrutiny is that those sorts of issues can then be addressed.

Q17 Mrs James: The flexibility is there?

Nick Ainger: Yes.

Q18 Nia Griffith: If we can talk about the Fields in which it might be operating, we have been told that, on current predictions, at least five sets of Matters are likely to be added to the list of Fields as a result of the new procedure each year, so what arrangements will there be for the maintenance and publication of a consolidated list of Fields?

Ms Hutt: I think it is important that those matters obviously are inserted under the Fields in Schedule 5 clearly and it is the matters conferring competence. I think the importance in terms of each Order in Council or bill, whatever we call it, conferring legislative competence, is that it will directly amend Schedule 5 and at any particular moment in time the extent of the Assembly's competence will be easily identified, so we need to do that by ensuring that there are links to the latest version of Schedule 5 on both the Wales Office's and the Welsh Assembly Government's websites so that anybody would be able to see at any time how we have extended the Assembly's legislative powers, and that would be crucial for the Welsh public and indeed in terms of ensuring that that extension of legislative competence has been acknowledged, maintained and updated.

Q19 Nia Griffith: Could you perhaps tell us a little about the arrangements to ensure that the Welsh Assembly Government has the personnel who are trained up to be able to undertake the drafting of these new Legislative Competence Orders?

Ms Hutt: What we are doing at the moment is we are now employing a whole new raft of staff to ensure that we have got the competence and we will clearly have our own first Welsh Legislative Counsel within our Legal Services Department and I can tell you that that is initially going to comprise four lawyers, supported by translators, and that capacity will be kept under review. The recruitment of that first Welsh Legislative Counsel has been supported by the First Parliamentary Counsel so that has been very helpful that there is that interface. Indeed we are getting the support, and Dr Rawlings might want to comment here, from Parliamentary Counsel to assist the Welsh Assembly Government so that we do ensure that we have got the capacity and that in terms of senior Parliamentary Counsel, we need advice and guidance to the first Welsh Legislative Counsel and more junior Parliamentary Counsel to provide direct support, so that has already been organised and I think that is going to be the subject of a protocol.

Q20 Mark Williams: Turning now to the initiation of your proposal, could we expect an annual statement, a Queen's Speech-type announcement or annual statement of the Assembly Government's legislative programme or would it be something a bit more sporadic than that? What are your plans there?

Ms Hutt: We would anticipate the Welsh Assembly Government being able to make an annual statement very soon after the election in May 2007 and that would be an annual legislative programme statement. It would be a strategic and legislative programme statement, a Queen's Speech for Wales.

Q21 Mark Williams: In the case of an Order that has originated from a draft committee-proposed order, would there be any circumstances where you would see the preparations and any inter-governmental negotiations passing to the Welsh Assembly Government?

Ms Hutt: If we look at the way in which we have operated up to this point in terms of our powers internally, we have committees which have undertaken substantive policy reviews and Welsh Assembly Government ministers of course at present are members of committees, but, with separation, that will cease to happen. At present, a committee will produce a policy review and present it to the Assembly and a government minister will respond to any recommendations and indicate the Government's recommendations and what they are going to accept. We would anticipate that, in terms of that kind of policy review informing them of the proposed Order in Council, that will have been in the parliamentary domain and the Assembly domain for quite some time and indeed we can envisage that there will be issues where there would

be a free flow, I am sure, with Welsh Assembly Government officials and others. These are not questions for me, but for the Presiding Officer and perhaps also the Chair of the Standing Orders Committee to this Committee, but I would imagine that there are going to be, and I would think there are already, discussions about how we can work together to ensure that there is a free flow of information as there is at present and that the Government can be as supportive as possible to the Committee.

Q22 Hywel Williams: Turning to pre-legislative scrutiny, will that be a standard procedure?

Nick Ainger: Yes, we made that clear in the passage of the Act and it is for the Committee to decide which Orders in Council it wants to scrutinise, but we will be offering that and have made it clear, as in responding to Mrs James's question, that it is important. We know that the work that this Committee has done in the past has been very, very helpful in its pre-legislative scrutiny role in delivering, I think, quality legislation in a very effective way, and I am thinking particularly of the Transport (Wales) Act and so on.

Q23 Hywel Williams: I am just wondering, is there any provision for a shortened or accelerated procedure which perhaps dispenses with pre-legislative scrutiny where there is a technical matter which needs attending to or if there is a case of urgent necessity?

Ms Hutt: I think again, in terms of looking at developing our Standing Orders, we are anticipating that there might be occasions when we would need to, or our Business Committee would have the role and function of business managers and looking at whether we did need to, have pre-legislative scrutiny. That may be because there has been a thorough consultation, and I am sure the Welsh Affairs Committee has been in that position where you have felt you have already been through the consultation exercises, so I think it will be a question of that judgment as it comes to the proposed order.

Q24 Hywel Williams: By the Business Committee?

Ms Hutt: In terms of how we would handle it, but clearly your opportunity is with you.

Nick Ainger: Here, as I indicated, we are going to be offering this Committee the opportunity to do pre-legislative scrutiny on every Order in Council, unless there may well be a particularly urgent Order in Council which we have to get through very quickly, but I think these are going to be extremely few and far between and I am sure everyone would appreciate why those circumstances do arise.

Q25 Mr Jones: Minister, if, for example, the Assembly decided to recommend that a particular proposed LCO should not be the subject of pre-legislative scrutiny and the Secretary of State thought otherwise, who would have the final say?

Nick Ainger: If the Assembly recommended that there be none?

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Q26 Mr Jones: Yes.

Nick Ainger: Well, as I have said, irrespective of the Assembly, we are saying that, unless it is an emergency procedure, pre-legislative scrutiny would be offered to this Committee.

Q27 Mr Jones: So the Committee would have the final say?

Nick Ainger: Well, the Secretary of State, as I indicated. The process is that the Secretary of State will take these proposed Orders in Council and offer this Committee the opportunity to do pre-legislative scrutiny.

Q28 Mr Jones: And it is then up to the Committee?

Nick Ainger: It is then up to the Committee, absolutely. One of the things we have spoken of around this issue is, if you like, the capacity of the Assembly to handle, and I have seen some figures quoted of, up to 30 measures a year which I think, as a former business manager, is just unattainable. I think what your Committee has to do is also consider your own work programme and obviously you do not want to be completely inundated with taking through Orders in Council and the pre-legislative scrutiny as well, so there are balances to be struck throughout this process about the capacity of this Committee, Parliament and the Assembly not only to take through the Orders in Council process, but also then for the Assembly to take through the Assembly measures and that is the limiting factor. I think we ought to be very realistic about what the capacity is at all those stages.

Q29 Mr Jones: What role will there be for other bodies in terms of pre-legislative scrutiny, for example, in the House of Lords?

Nick Ainger: I do not know if you have seen the comments of the House of Lords Constitution Committee, but they have been extremely helpful in saying, first of all, that, if there is to be any pre-legislative scrutiny in the House of Lords, it should complement, rather than duplicate, the work of this Committee, that it should be concurrent rather than consecutive and also any committee that is scrutinising in the Lords should have a real knowledge of Welsh affairs. I think that is very good advice and it is up to the other place to decide its own procedures, but I think that is very good advice from the Constitution Committee who have looked at this and taken evidence from the Secretary of State.

Q30 Mr Jones: But you do envisage that they have got to have a role in this?

Nick Ainger: It is up to them, but I think the suggestion or the strong recommendation by the Constitution Committee is that it should complement the work of this Committee and, importantly in terms of length of time that these matters are considered by Parliament, that it should be concurrent with the work of this Committee, for example, not consecutive because then we are just adding to the problem in relation to time.

Q31 Nia Griffith: To what extent then will pre-legislative scrutiny accommodate the interests of MPs who are not members of the Welsh Affairs Committee?

Nick Ainger: Well, as you know, you publish what programme the Committee is going to follow and any inquiry that you are engaged in and that will be an opportunity for Members of Parliament to submit their views to this Committee. However, in addition of course, when it does return either to a committee or to the floor of the House, then every Member of Parliament has the right to attend, and speak, at that committee or on the floor of the House, but again pre-legislative scrutiny gives Members of Parliament that opportunity to feed in their views, but again it is around the issue of the appropriateness and the scope of the legislation.

Q32 Hywel Williams: Can I just go back to scrutiny by the Lords. Do you envisage at all circumstances where there might be a joint committee, say, between this Committee and a committee of the House of Lords and also possibly of the Welsh Assembly?

Nick Ainger: That is a matter for you, it is not a matter for me. My own view is that the advice from the Constitution Committee is very good advice and I think that there may be problems in actually trying to constitute a joint committee of both Houses to scrutinise an Order in Council. As I say, it is a matter for this Committee, but the important thing is that we do not want this process to be drawn out unnecessarily and my fear is that, in setting up joint committees and so on, you could be starting to extend the programme. The whole purpose behind this process is actually to get over the delays and the logjam which exist in our current processes and what we do not want to do, whilst trying to encourage pre-legislative scrutiny, is to actually go back to that position where we have in effect got a logjam happening because we are waiting for a committee to complete its scrutiny.

Ms Hutt: We do not want duplication of effort obviously or the repetition of effort on consultation, but it will be such a good opportunity, as we saw with the Transport (Wales) Bill, to have joint scrutiny between the Assembly Committee and the Welsh Affairs Committee. Indeed, you can imagine that, where the Welsh Assembly Government has already laid out its programme on an annual basis, there will be a lot of understanding in Wales, public awareness, interest and input, I am sure, from the civic society and all the other interested stakeholders in how it will feed very directly into that pre-legislative scrutiny when it comes about, but it is about fast-tracking and streamlining, I think; that is what we want.

Q33 Mark Williams: Not wanting to contribute to the logjam, do you see any role for the Welsh Grand Committee in the participation of pre-legislative scrutiny?

Nick Ainger: I think there is a role for the Welsh Grand Committee where you have particularly complex or maybe contentious Orders in Council coming through and, if this Committee made a recommendation in its report that perhaps this is a matter that should be debated in the Welsh Grand Committee, then certainly I, as a Minister, would have no problem with that. Obviously the business managers may have a view, but, in principle, no, if this Committee recommends that a particular Order in Council should be debated in the Welsh Grand Committee, I see that as something good as part of the process. We did it, I think, in the Transport (Wales) Bill and we had a debate on the report of this Committee before we went through the full process of scrutiny of the Bill, so I do not have a problem with that at all.

Q34 Mr Jones: How will the outcome of the pre-legislative scrutiny be factored into the proposed LCOs?

Nick Ainger: If the Committee and the Assembly Committee will report and if they are recommending changes to the Orders in Council, then obviously that will be looked at very closely by the Welsh Assembly Government. Any changes, any amendments to what has gone through the pre-legislative scrutiny, the draft there, it would then be changed and laid before the Assembly which would then vote on what is then the amended proposal and it would be that draft which would then come up to the Secretary of State for him then to lay it before Parliament.

Q35 Mr Jones: So, in that particular case, the scrutiny procedure would not be repeated?

Nick Ainger: No.

Q36 Mr Jones: Let us say, for the sake of argument, that a modified Order were made which, for the sake of argument, did not incorporate all the modifications proposed by the Committee, would the Committee have a second bite at the cherry in those circumstances?

Nick Ainger: That is not proposed, no, and it is the same way that pre-legislative scrutiny happens now with ordinary bills here. Again coming back to the Transport Bill or the Transport (Wales) Act, as it is now, that is a very good example where a substantial part of the recommendations that were made by this Committee were adopted and included in the Bill, but I think it is true to say that not everything was included. Now, that could then figure, as you well know, in that, where there has been pre-legislative scrutiny of any bill, often a considerable part of not just second-reading debate, but committee-stage debate focuses around why a particular recommendation that has come through from the Committee has not been adopted. No, we would not envisage this sort of almost ping-pong going back until agreement has been reached.

The views of this Committee would clearly be taken on board, but they would also be taken on board by those members of the standing committee that were looking at the final draft as well.

Q37 Mr Jones: Is there any reason why the pre-legislative scrutiny procedure was not set out on the face of the Bill when Parliament came to consider it?

Nick Ainger: Quite simply because the Government cannot tell a select committee what to do, and quite right too. We cannot, as the Government, say to this Committee, "This is the procedure that you shall follow in terms of pre-legislative scrutiny". We cannot tell this Committee that this is the type of inquiry you should be following and, as I said earlier, it is for the Committee itself to look at the Order in Council and you may well decide, and I am not saying certainly in the first year or so, but, as this procedure goes on, it may well be that you become quite selective in the type of Orders in Council where you do go through the full pre-legislative scrutiny.

Q38 Mr Jones: I understand that, but there is no mention of the role of this Committee, if I recall, in the Act itself.

Nick Ainger: It is not on the face of the Act, but certainly, as you will recall, we had extensive discussion about this and I certainly gave, and I am sure the Secretary of State also gave, a commitment that we would be laying these proposed Orders in Council before this Committee for pre-legislative scrutiny.

Q39 Mr Jones: So it is a question of developing conventions really?

Nick Ainger: Well, we have set out quite clearly what we believe the process should be, but, as I say, we cannot, and it would be wholly wrong for the Executive to, instruct a select committee on its work programme or on the way to do pre-legislative scrutiny. We are giving that guarantee that we are offering it for pre-legislative scrutiny.

Ms Hutt: Also, we have been very clear about welcoming that opportunity for joint pre-legislative scrutiny and clearly to give this a full airing in terms of pre-legislative scrutiny because it will be for us a big, important part of our new powers in terms of taking forward the Orders in Council.

Q40 Chairman: If we could turn to the question of parliamentary approval, do you envisage any modifications to the standard procedures relating to laying and approval called for in the case of LCOs?

Nick Ainger: No, other than it is unusual, to say the least, that we are having Orders in Council going through pre-legislative scrutiny and we have given that clear commitment, but, in terms of the hour and a half debate in both Houses, no, we do not

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envisage any changes there. What I can say though is that I think the pre-legislative scrutiny will enable the issues which may be contentious to be properly aired and that the possible amendment of a proposed Order in Council can take place.

Q41 Chairman: Do you anticipate that the more substantial Orders will be taken on the floor of the House?

Nick Ainger: Yes, and that is a matter for the Opposition through the usual channels to make a case for a particular Order in Council or maybe for the early ones, because this is a new process, to be taken on the floor of the House. Again, from my experience as a business manager, when a case is made by the Opposition, clearly usual channels function in the way that they do and often deliver something which the Opposition would like to see happen, so again this is a matter not for me, but a matter for the usual channels.

Q42 Mrs James: How will you ensure that the Assembly's interests are safeguarded during the parliamentary approval stage?

Nick Ainger: Well, the way the process works is that the Order in Council has come from the Assembly, most of them will have been initiated by the Welsh Assembly Government and the proposed Order in Council will have had a vote in the Assembly for it to come up here. Before that has started, the Welsh Assembly Government will have embarked on a process of discussion, seeking agreement from other government departments. It then comes up here for pre-legislative scrutiny and it is then up to this Committee to make possible recommendations to change any part of that Order in Council and that would then be the responsibility of the Welsh Assembly Government to amend, or not, the Order in Council. At all stages, the Assembly and the Welsh Assembly Government are completely involved in any development of, and changes to, the Order in Council.

Q43 Mr Jones: What arrangements have you envisaged to co-ordinate the timetabling of pre-legislative scrutiny here and in the Assembly?

Nick Ainger: Well, I do not think we can actually timetable them. I know my former colleagues in the Whips' Office would love to be able to timetable this, I am sure, but what we envisage is that after the initial discussion with other government departments has taken place, before the proposed Order is laid in the Assembly, from that point on we will expect the process to be completed in three to six months. That would include the pre-legislative scrutiny here and in the Assembly, it would include any amendments that may take place in the Assembly before the final draft comes up here and then it being laid and debated here in committee, so three to six months and certainly six months would be the maximum time.

Q44 Mark Williams: What arrangements will there be to ensure that the parliamentary timetable can cope with this? I am aware we are talking about five or six LCOs annually, but one could envisage situations when the parliamentary timetable at this end was particularly heavy. What discussions have you had about that?

Nick Ainger: I think, in terms of the number of statutory instruments and Orders in Council going through, adding four or five to that programme is manageable. We would expect them to be not four or five coming straight through in one lump, but that they would be phased throughout the year because, as I said earlier, this is the beginning of a process for the enactment of Assembly measures and, from the Assembly's point of view as well, they need their business to be evenly paced throughout their year, the same way as we try to have it evenly paced throughout the year, although it is often quite difficult at the beginning and at the end of any parliamentary session, as we all know here. That would be the ideal position, that we would not be having four or five coming through all at once, but that they would be phased and I think that is quite manageable in parliamentary terms.

Q45 Hywel Williams: The arrangements and the procedures that you have outlined all seem to depend a great deal on goodwill and consensus, the Pecksniffian sort of assumption here, if we could term it as such. Has your thinking encompassed perhaps the Secretary of State, or perhaps the Under Secretary of State with a different strength, throwing a spanner in the works, as it were, and what conclusions have you reached?

Nick Ainger: Well, as I indicated earlier, the Secretary of State has spoken of this convention that the presumption is that, as long as the proposed draft Orders in Council are appropriate and within scope, then they should be approved. If you got to a hypothetical situation where the Secretary of State was acting unreasonably or was refusing to lay Orders on trivial grounds within the 60 days required, and the 60 days is there to ensure that any unhelpful Secretary of State cannot sit on an Order *ad infinitum*, they have to respond to the Assembly, stating quite clearly why they are not willing to lay a particular Order. For that to suddenly pop up at that stage would be very unusual, bearing in mind what I said about, before even a proposed Order in Council is laid before the Assembly, before it comes up to this Committee, when an awful lot of work would have been going on around different Whitehall departments to check that it is appropriate and it is within scope and so on. I do not think this is a sledgehammer to crack a nut, but at the end of the day within the Act there is the possibility, following a referendum, that in fact primary rule-making powers can pass to the Assembly. Therefore, there are those procedures set out in the Act where, if you did have a Secretary of State who was acting unreasonably regularly, then the risk for that particular Secretary of State, rather than having this current process, is

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that in fact that Secretary of State would have no involvement whatsoever because a referendum could be held and all law-making powers in terms of the functions of the Assembly would be passed to it.

Q46 Hywel Williams: But he or she would have to give his or her approval for such a referendum of course?

Nick Ainger: Well, again if they are seen to be acting unreasonably, then—

Q47 Hywel Williams: I am using your phrase.

Nick Ainger: Yes, but I think the reality is that if that convention is accepted, as is the theme and the thrust of the Government of Wales Act, that the Assembly should gain these powers, it would be, as I say, very unwise of any future Secretary of State to start acting unreasonably.

Chairman: Thank you all for the very comprehensive and concise way you have answered our questions. Happy Christmas!

Witnesses: **Rt Hon Lord Elis-Thomas AM**, a Member of the House of Lords and Presiding Officer, National Assembly for Wales, and **Mr Aled Eirug**, Constitutional Consultant and **Mr Adrian Crompton**, Head, Members Research and Committee Service, National Assembly for Wales, gave evidence.

Q48 Chairman: (Interpretation) Good morning and welcome once again to the Welsh Affairs Committee. Please will you introduce yourselves.

Lord Elis-Thomas: (Interpretation) It is a pleasure to introduce Adrian Crompton, who is the Head of the Members Research and Committee Service, and Aled Eirug, who is our constitutional consultant, and it is a great pleasure to meet in the Lloyd George Room.

Q49 Chairman: (Interpretation) I am sure that he has a smile on his face! I understand that you will all be presenting your evidence in Welsh.

Lord Elis-Thomas: (Interpretation) I do not intend to give evidence, but to answer questions.

Q50 Chairman: (Interpretation) Do you all three intend to be speaking in Welsh?

Lord Elis-Thomas: (Interpretation) Aled Eirug will be speaking in Welsh and it is my usual practice, as a matter of courtesy, to answer any question in the language that it is asked, if I understand that language, and that is what I intend to do today.

Q51 Chairman: (Interpretation) We will do our best and I am sure you will understand the pure Welsh of the Tawe Valley.

Lord Elis-Thomas: (Interpretation) Yes, always.

Q52 Chairman: (Interpretation) May I begin by asking this question: do you anticipate that proposals for these LCOs will be made without a specific measure in mind?

Lord Elis-Thomas: (Interpretation) Before I answer the question, perhaps it would be of assistance if I were to explain where I come from as a witness here today. I am very eager to be as helpful as possible. My position at present is Presiding Officer of the existing Assembly. I was not part of the process of preparing the Standing Orders, but Jenny Randerson, who was responsible for that, will be coming before you later on, so I do not believe it would be appropriate for me to make detailed comments about what, as yet, has not been approved by the Assembly. However, if there are

any questions that impact on our activities, I will endeavour to answer them today or we could prepare written comments for you and I am very willing to present a letter on any matter of that nature, with the assistance of my colleagues. The answer to the first question is that it is most unlikely, but of course it is possible because, according to the procedures that we are likely to adopt, it will be possible for a Member to win the opportunity in a ballot to table a proposal for an Order and it will also be possible for a Member to win a place in a ballot in the same manner for a Measure, so it is possible for those two routes to be used, but the likelihood, I believe, for individual Members anyway, would be that the proposal, or the intention, to legislate by Order and by Measure would go hand in hand. Obviously from the Government's point of view, it is likely that the Order will be the Order first and then the draft Measure following, but I would assume that it will be very important that there should be an Explanatory Memorandum accompanying every text involving the legislative process and that is important not only for us at the Assembly and for you in Westminster, but it is also very important for the public, for the voluntary organisations and for everybody outside Wales and beyond Wales who will be affected by whatever is prepared.

Q53 Mr Jones: In terms of procedure, how do you anticipate the process for adding a wholly new Field to Schedule 5 will differ from an application for an LCO in terms of an addition of a matter to an existing Field or to vary an existing Field?

Lord Elis-Thomas: Well, I have lived with, is it three, is it four, is it five, different routes by which the Assembly accrues powers over the last seven and a half years? As far as we are concerned as to how we operate our procedure for subordinate legislation at the moment, the question is whatever form it comes in, whether it is in the form of a transfer function Order, whether it is in the form of the original Government of Wales Act or whether it emerges from a Westminster Act of Parliament, the effect upon us is similar; it produces a piece of

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subordinate legislation which we then have been dealing with. Now, especially in our work in the Assembly Commission, the shadow commission looking at the new system as it will be from after the third Welsh general election in May, the way I try to approach it is to think, "How can we now take our current procedures, refine them and adapt them to deal with the new context?" I do not think it makes a difference how a Field is redefined, as far as we are concerned, because that really is a matter that will be for inter-governmental discussion rather than for the Assembly itself to decide. Now, if the changes in Fields impinge on us in the form of the nature of the measure or the breadth of the Measure, then that is obviously a matter for us and there will be the facility for whomever will be the Presiding Officer at that time to declare competence as within the Act and that will be clearly a statement in the Assembly in all cases.

Q54 Nia Griffith: (Interpretation) What information and documentation will accompany proposed draft Legislative Competence Orders?

Lord Elis-Thomas: (Interpretation) I have already mentioned the importance of an Explanatory Memorandum and that that is presented with each and every proposal, whether it be a proposal for an Order or a Measure. Of course that means that, if they are tabled by a Member or through a committee, and there may be an opportunity to discuss that in a little while, because I do see the possibility for the generation of applications for proposed regulations from committees and measures through committees, I think that could be a relatively effective way for us, considering the way we have worked to date. However, I would not want to set down exactly what should be included within a Memorandum in its final form because obviously those will develop, but they will at least have to be as comprehensive as has been common practice in terms of the kind of explanatory documents produced in this House, thereby the explanation must be clear, laying out the intentions. If it is a Measure, that should be done clause by clause or, if it is a draft Order or a proposed Order, then that too would have to be just as clear, but far briefer. What would be important, in my opinion, regarding an Explanatory Memorandum for an Order is that it should state clearly that the proposal is competent within the areas laid out in the Act.

Q55 Mrs James: (Interpretation) You are not going to hear the pure language of the Tawe Valley from me, I am afraid! In any protocol governing the preparation of LCOs, should any guidance be provided as to the level of generality in which the new powers are expressed?

Lord Elis-Thomas: (Interpretation) Well, you have asked the question and, therefore, I am invited to enter into areas of protocol which are likely to present themselves, but I do think it is very important, and this might be the opportunity to say this, that any protocol should start by stating that

it is an intention that these processes should be as open and transparent as possible. It is a difficult area, but traditionally discussions between ministers and inter-governmental discussions do happen confidentially, but ministers are also accountable for those discussions and, therefore, we have been discussing this area beforehand and I will invite my two colleagues to make additional comments here because it is an area that we are currently considering. We do believe that it could be appropriate for the First Minister, for example, to be accountable to the Assembly for anything which happens to a proposal for legislation. Now, once the Assembly has approved that, he will become responsible for it constitutionally in relation to what happens here, so any discussions which the First Minister has had with a minister, whichever minister that may be, in the Westminster Government regarding the application to legislate in such and such an area, I would predict that anyone presiding when that question was asked would believe them to be in order and, therefore, you could have an open discussion. That is just as important to me as what is included within the protocol because this is a new process, a new, legislative process and the protocols do have to be as understandable as possible. This concerns me greatly regarding this whole system and I do understand of course that this is the result of a political compromise, such as was the previous arrangement, but I do hope that it will be far more effective than the previous system, but, because of that, there is a danger that the procedures can be vague rather than transparent and that is anti-democratic, in my opinion. Now, that does not respond to the question entirely, but it does take us in a direction which might be useful.

Q56 Mark Williams: It is likely that parliamentary committees may wish to see specific provisions included in certain circumstances, for example, authorising significant invasions of individual rights, such as compulsory powers of entry or inspection. Is there not a risk that the whole process of making LCOs could become attractive at this end through Westminster or Whitehall concerns?

Lord Elis-Thomas: Well, I have hesitated to use the term "co-legislating" because it means all sorts of other things in the European context and in what I might call "proper federations" as opposed to the United Kingdom which is not yet a proper federation and may never be, but at least I would describe what we are talking about this morning as federal with a small 'f'. As to who does what, where and when, who influences what, where and when, it is, I believe, again a matter for how the process evolves. What is important is that the process is an open one and open to influence. Now, I will not answer in detail, it is a matter for Jenny Randerson, the Chair of the Standing Orders Committee, but I understand that the standing orders will be providing for an opportunity for pre-legislative scrutiny both of proposed and draft Orders and indeed similarly of Measures, so the opportunity is there, as you have heard already this morning, for

you in Westminster or for us next door, both Houses, to take part in that pre-legislative scrutiny and it is possible for the Westminster input to happen at that stage. Now, I agree with you, it gets much more complicated if strenuous efforts are made to amend an Order in Council or a proposed Order when it has finished its Assembly initial stages, as it were. If that happens, then it gets more complicated, but I would not seek to prescribe, or proscribe, in this area because I am not competent to do that, I am only competent to tell you what Assembly practices might be on the basis of certain principles, but I would not want to prescribe, or proscribe, what the House of Commons or the House of Lords might do. However, I think it is worth looking at the way in which the House of Lords in particular has looked at subordinate legislation as it has progressed through the Assembly up to now, and the view has always been, and I pay tribute to Lord Dahrendorf and his committee in the Lords for his understanding of all these issues and indeed for the quality of the Explanatory Memoranda produced by John Williams and others in the Wales Office, that they have established the principle that, where a matter has been scrutinised by a democratic body, it does not make much sense for it to be regurgitated, as it were, in scrutiny in another body. Now, I am not saying that that might not happen and that there might not be political reasons why certain Members might be free of course to do that if they want to, but in that situation it is for, as usual, the business managers of institutions to see how this might happen with the least disruption to other government business and so on. These are all issues of process and learning and I think it is more important that we learn how to make this system work than it is to try to prescribe in too much detail at this stage how it might work, in other words, if you felt free in your report to highlight some of the pinchpoints and some of the issues that might be problematic and then to say, "Maybe we should wait and see how Parliament, both Houses, and how the Assembly in its processes might be able to allow for these things to happen". However, I would point in particular to the importance of quality joint working, as we have already done, if we can achieve that, because that has worked very well when the Assembly Members have been involved in the scrutiny of Westminster draft bills and the same thing could happen in this more complicated process, I think.

Q57 Hywel Williams: (Interpretation) On current predictions, at least five sets of Matters are likely to be added to the list of Fields annually. What arrangements will there be in place to ensure that a consolidated list of Fields will be available so that one can know exactly where one is at any given time with the very complex amendments and changes that could take place?

Lord Elis-Thomas: (Interpretation) This is a question that is relevant to our situation at present of course. Who knows what the law of Wales will be and the answer to the question is that David

Lambert and Mario Navarro, they know. On the Wales legislation online website, it is all there, well, almost all of it, but this is not a satisfactory situation and I believe they are duty-bound to ensure that this information is available in an understandable manner for everybody and it is our duty certainly within both Acts and it is a duty we will have to accomplish more effectively, namely to declare what the powers of the National Assembly are at any given time and perhaps to do this annually or perhaps reiterate it annually by setting out a clear and concise description on our website of what we can do because this is quite important for the democratic discussion and debate. It is not enough, in my view, to wait for the statements of the Presiding Officer of the day to say that this request for a Measure or an Order comes within the competence of the Assembly's powers. In order that the democratic process works, that information must be available to all interested parties and I will take that question home with me in order to have a think about it. Adrian, do you have any views on that, or Aled?

Mr Eirug: (Interpretation) I think one obvious point is the advantage of the Assembly website, which has been relaunched this month, in order to allow an opportunity to update the contents of the section of the Act and it gives a feel for what the Assembly is responsible for.

Q58 Hywel Williams: (Interpretation) I was just thinking that would be more than an annual statement because it would be updated at all times.

Lord Elis-Thomas: (Interpretation) I am sorry, I go back to the old-fashioned way of working. Yes, of course the website would be updated regularly.

Q59 Mr Jones: This is possibly a question for Mr Crompton: what support will be provided for the preparation and drafting of proposed LCOs that emanate from committees or from individual Members?

Mr Crompton: It would be a matter for Assembly parliamentary staff to support committees in that way. We have our own legal, clerking and research services, all of which provide support presently to allow committees to do that and individual Members to do that.

Q60 Mr Jones: And you regard that as adequate or would it need to be augmented?

Mr Crompton: For Orders in Council it is certainly adequate at present. The Presiding Officer can tell you more about the steps taken to augment the service in anticipation of drafting Measures. For Orders in Council I would not see a problem at all.

Lord Elis-Thomas: Can I just add to that in terms of capacity. It is the responsibility, as you know, of the Assembly Commission to ensure that Assembly Members have the capacity to carry out their activities. I can make a commitment here today that we certainly intend to make sure that the support will be there for drafting because without that the entire system cannot function. That will require augmenting our present legal support. We

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have not yet decided how that is done because we have just appointed a new Chief Executive. The Welsh Government has already advertised for senior legal people, as no doubt you have seen. And we do intend, as far as possible, to operate a shared legal service with the Government, as happens in Scotland and elsewhere, but of course there will have to be that opportunity for advice which is not from government lawyers, whether they are seconded to us or whether they work for us under contract or as legal advisers who are not part of our direct staffing complement. We have to make sure that that is available. If you know of any parliamentary counsel who want to move to Cardiff I would like to have their email address.

Q61 Hywel Williams: (Interpretation) If I could ask you about Member-proposed Orders. When we have reached the position whereby the Assembly has approved those Orders, will it be the responsibility of the individual Member in terms of discussions with Westminster departments or will there be some support from the Assembly itself? Could you outline what the arrangements will be?

Lord Elis-Thomas: (Interpretation) That is an extremely interesting question and one that we have been discussing in our preparations for this morning. The legal position is relatively clear, I believe. The Member-proposed Orders actually go through a process of approval in the secret ballot and then there would have to be a vote in the Assembly itself with a right to table that particular proposal according to the Standing Orders, as I understand them. Once they have come through that Assembly process and have been approved either as a draft proposal for an Order or as a motion for a Measure, then they will go through the same process whereby the First Minister has to inform the Secretary of State and then the drafts are presented here. Once they have left the Assembly, as it were, then Member-proposed Orders and those emanating from committees have become proposals which have been approved by the Assembly as an elected body. There is no question that they should not have the same status but as one who suffered in this House as a result of failing to take a private Member's bill into being as an Act many years ago, I was (and am) very aware, as an individual Member, even with the support of Government as was the case in my case, of what can occur. I do think it is important that we ensure in the Assembly amongst the Commission officials, that the Clerk of the original committee that took the Measure through or someone involved with the Measure and who understands its context could be able to work alongside officials in this House or next door when the rest of the processes are gone through because I do not think that it would be appropriate to leave things there. Not that we intend to—and again this is all in our minds at present and I would like you to consider it—and obviously the First Minister is responsible for letting the Secretary of State know that and Wales Office officials are responsible for presenting the proposed legislation to you here, but I do think

that it would be appropriate that there could be someone from our side holding the hand of the Member, as it were, or keeping an eye on what is happening. Does anyone else have a comment?

Mr Crompton: Forgive me for responding in English.

Lord Elis-Thomas: Do not worry, English is an official language of the House of Commons!

Mr Crompton: Strictly speaking, it would be a matter for the Member in charge of the proposal to decide how and when they engaged with Whitehall departments. However, we would certainly look to provide advice to Members on taking the draft through the Assembly, that they should do that appropriately, and obviously we look to facilitate that as best we can.

Q62 Mrs James: Coming on to pre-legislative scrutiny, is provision to be made for a shortened or accelerated procedure that dispenses with pre-legislative scrutiny in certain circumstances, for example where a matter is merely of a technical or legal nature, is of minor policy significance, or perhaps involves a case of urgency?

Lord Elis-Thomas: That is a very difficult one, the urgency one because urgency is usually determined by the Government. As somebody who was here in the early days of some of the emergency legislation in Northern Ireland, I very much regret some of the things I supported at the time, so one has to be very careful when dealing with urgency. The detail of this is obviously a question for Jenny Randerson as Chair of the Standing Orders Committee. As a matter of principle I am sure it should be possible within the Standing Orders for scrutiny to be dispensed with, but as a matter of democratic accountability I think it should be very exceptional. What our Standing Orders hopefully will provide and what arises out of the practice that we have undertaken so far is that we value scrutiny, we value having the participation, especially of civic society, of voluntary bodies and of campaigning organisations up close to our process of making secondary legislation and indeed our process of scrutiny of government policy and expenditure in the wider sense. So I would want to see pre-legislative scrutiny to be the order of the day, as it were, whenever there are proposals for orders or proposals for measures. I am suspicious of this view that is sometimes expressed that such-and-such is "only technical". I have heard so many ministers referring to clauses in bills and indeed sometimes to whole bills as if they were merely technical. Nothing in politics is merely technical. Everything has within it somewhere a democratic principle which we would need to address. I do take your point that occasionally we may not want to follow this or the Assembly may not want to follow it in future, but as a matter of principle the more the better, and the more you are involved at an early stage the better. The point of that is so as not to duplicate the giving of evidence by outside witnesses which is where, after all, the joint working between the Assembly committees and this Committee started.

Q63 Mark Williams: Just to push you on a little bit further, notwithstanding what you said about the need for pre-legislative scrutiny, who is going to have the ultimate hand in saying that pre-legislative scrutiny is not to take place and if there were differences between the Secretary of State and the Assembly on that matter, how would you see those problems being resolved?

Lord Elis-Thomas: It is quite clear to me that the Secretary of State's only locus in the Assembly is to make a speech once a year! There is no question about that. He or she may in future perhaps have inter-governmental relations with ministers in the Welsh Government but as far as the Assembly is concerned, as I say the Secretary of State is a distinguished visitor who makes—in case I have caused offence—very useful speeches and makes a statement and replies to questions. So who decides in the Assembly? It can only be the Assembly who decides and it would be the Business Committee. Again, this is a matter you can discuss with Jenny Randerson in greater detail. If necessary, it is a matter for the Business Committee to refer to an Assembly committee, and that is how it would happen. As regards joint scrutiny, that is a matter for you I would have thought, not a matter for government. If you insist on jointly scrutinising something with us then we would facilitate that. Our Standing Orders allow us to do that. I have not sufficiently refreshed myself recently on whether the procedures of the House of Lords enable that to happen yet, but I am sure it will be on its way so there could be joint scrutiny by both Houses and by Assembly Members.

Chairman: I am certain that the Secretary of State was listening intently to your replies, particularly the last one!

Q64 Hywel Williams: (Interpretation) I think it is very interesting as regards which bodies are involved in pre-legislative scrutiny. You have answered that to some extent unless you would like to list for the purposes of the record how you see the bodies.

Lord Elis-Thomas: (Interpretation) As I have been invited perhaps it would be easier for us to think about what we could add in writing to that point after reading the record of this meeting because you will also receive comments from Jenny Randerson and the Standing Orders are already public. That is the relevant part of this discussion and work is almost complete. Once the Standing Orders have come before the Assembly and are adopted, it will be easier for me to discuss them. What is important to us is that the opportunity to undertake pre-legislative scrutiny is a crucial opportunity within the democratic process and it will give a new legality to the new process in the second Constitution post-2006 so that we will do this in a better manner and the people of Wales will have a greater impact on measures that will be coming out of the system and therefore an opportunity to make reference to the Business Committee, or whomsoever within the new system, to make reference to an Assembly committee. In that

position there would be an invitation for committees from this place to participate in that process. Obviously two reports would be prepared. That is what we do at present; when we have a joint meeting two reports are published, and a report from the committee could be different to that which the Government in Wales intends to do or something which is acceptable to the Government here in Whitehall. Those are not matters for the Assembly because our job is to make this complex system work and to provide as many opportunities as possible for the people out there and for the organisations out there to be able to participate in the legislative process. Very recently, over the past few years it has started seriously here with the use of special select committees, as we used to call them, in order to scrutinise Acts beforehand. That is happening here but in our context there is an opportunity to discuss the propriety or the need for any legislation at all, which is a very valuable opportunity. That is what will happen in discussing proposals for possible Orders. We are in a very interesting and new field in the process of drafting legislation but it is a more difficult question that we need to face up to in future to make more understandable legislation.

Q65 Mr Jones: How do you envisage that the outcome of pre-legislative scrutiny be factored into the process of bringing forward LCOs?

Lord Elis-Thomas: It would be in the form of a report from the committee. It would be presumably a report here as well at a particular stage. I think the timing of these issues, as I heard you discuss in earlier evidence sessions, is very germane to how effective the whole process is, but it would be in the form of a report. There is the particular case of course if something emerges from a committee. If a committee is, say, discussing a subject—and I will not take controversial ones like mental health legislation or fox-hunting, I will leave those aside this morning—so let us take a piece of countryside legislation that an Assembly committee might be looking at like countryside management in Wales and whether it might be done in a simpler manner. I will not go into detail otherwise I will become controversial again! Let us take a hypothetical countryside proposal for an Order. If that is emerging from a study by a committee of a particular policy area, it would not make much sense for that committee to go back. Let me say that again so that it is clear. The committee looks at an area of policy, during the discussion it emerges would it not be a good idea to have some form of legislation in this area, so the committee then decides yes, we will do that, so of course being a committee, it does not have to go through a ballot like an individual Member and it has a route to propose legislation within the timetable of the Assembly. If it comes to that stage, obviously the Assembly committee itself will have undertaken pre-legislative scrutiny of its own as part of its policy formation work before it decided to have legislation. The question for you really here is whether it would be appropriate for you to be

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involved at that stage. My answer would be yes because the joint scrutiny already done between this Committee and committees of the Assembly has been very wide-ranging. The essence of the business is to allow witnesses to give evidence to a gathering of democratically elected representatives from two Houses, as it were, without having to repeat themselves on two or three occasions, as happened in the past.

Q66 Mr Jones: Let us suppose that Parliament or the Secretary of State expressed severe reservations about a proposed LCO so that the draft had to be modified. Would you envisage in those circumstances that the whole process of pre-legislative scrutiny would have to be repeated?

Lord Elis-Thomas: My short answer to that is hopefully not in the same year of business. Clearly these are political issues and every constitutional system produces new political questions and areas of political doubt and potential agreement and potential disagreement. We have been through all that in the seven and a half years we have worked the present system and we will go through it, I am sure, with this system. The important thing is that we go through it in an open and transparent manner so that we do not pretend that there is somehow not going to be conflict or that there are not issues that we would want to cover up. I would like to make one general comment here which is relevant to your question. I am not much entertained by this idea that the roof will fall in both in Westminster and in Cardiff Bay if there were changes of administration politically in either place. Goodness knows what the shape of the new Welsh Government and its Cabinet might be, especially after the events of last week; goodness knows what will happen here after the UK general election, but this has to work and has to be seen to be working through those elects and I am absolutely determined as far as I am concerned—and I very much hope to be re-elected as an Assembly Member although whether I might be re-elected as Presiding Officer is obviously a matter for the Assembly—and I am very keen to ensure that we make this system work. The way to make it work is to be open about these political pressures that any constitutional system generates. So I want the Secretary of State to be open when he or she disagrees with issues. I want the First Minister to be open, whomsoever he or she may be, and I want the Assembly, as it will always be, and its Members and indeed yourselves as Members of Parliament and colleagues in the House of Lords to be open about any disagreement, any constitutional issues, any principles that appear to arise surrounding any proposed legislative activity. That then is what will make this work as a transitional constitutional step.

Q67 Mark Williams: Turning to the matter of the Assembly's approval of an Order, if the plenary Assembly does not approve a proposed Order, and the proposer wishes to continue with an amended or a replacement proposal, would the entire procedure have to be repeated?

Lord Elis-Thomas: Yes, because it has fallen. It is like any attempt to introduce a private bill, any attempt to introduce a piece of legislation which does not have a majority; it presumably falls. There is no provision for doing it by the back door, is there, in Standing Orders?

Mr Crompton: If we were talking about a private Member's proposal and the draft fell, then the Member would have no opportunity to reintroduce it. If we were talking about an Assembly Government proposal, then it would become a matter for the Presiding Officer to judge how close a reintroduced Order was to the initial proposal and so whether or not the whole process had to start from scratch again or whether the pre-legislative scrutiny stage could be disappplied to that reintroduced Order.

Lord Elis-Thomas: And that again would be subject to agreement between government lawyers and whomsoever was Presiding Officer at the time. It is very important that we are working together on legal advice. Clearly there may be differences of emphasis—and there have been in the past even on our current powers—but that only works when that is resolved, and that is resolved by interpretation. That is ultimately for the courts if they go through those issues again, but we do not go there if we can help it.

Q68 Nia Griffith: (Interpretation) How would the Assembly's interests be safeguarded during the many steps of the approval stage?

Lord Elis-Thomas: (Interpretation) I am grateful for that question because I do think that I have been attempting to answer it in some of my previous attempts. Proposals for legislation, both kinds of proposals be they Orders or Measures, once they have been approved by the Assembly are under the responsibility of the First Minister and he must inform the Secretary of State. That is the constitutional position as I understand it. So there is no inter-parliamentary process between the Assembly and the two Houses here, but the interesting question for you is whether you think that there should be such a process which would support or be supportive of the political constitutional process between one government and another. If you did think that that was appropriate then how would that occur? One of the things that I have suggested—and perhaps it is minimalist on the level that we can provide it—is that one of the Commission staff, who would have been responsible for the original proposal as it travelled through the many steps in the actual Assembly, would actually follow its progress through the Houses here, but then they would also have been advised at an earlier stage, as Adrian suggested in one of his earlier answers, on the proposals being prepared for the individual committee member or the committee so that there is an understanding of the likely processes here. That would then assist the Member in preparing something which would perhaps be acceptable. I believe there is an opportunity for discussion to take place, as Adrian suggested, or for advice to be

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given between the Wales Office officials who would represent the Government here and the officials or Commission staff who would advise the individual Member. This is a very complex area of course, but if the process is to succeed then I do think that it would be appropriate for us to have the kind of discussions that we have been having certainly over the last two years as we have attempted to influence the content of this compromise. I do think there has been a very good relationship between the Wales Office and the Assembly Parliamentary Office over that period. I do very much hope that that process can continue. Of course the Wales Office is part of government, it is part of the Constitutional Affairs Department in Westminster, but of course it has responsibility also for the goodwill and the benefits or interests of devolution generally, and I think the continuation of that is quite important.

Q69 Chairman: (Interpretation) There is only one question remaining and it is the final question and it involves timetabling. To what extent do you envisage that there will need to be special arrangements? Do you envisage arrangements to co-ordinate the timetable of pre-legislative scrutiny by the Assembly and by Parliament?

Lord Elis-Thomas: (Interpretation) I think this is something that I would like to consider further, Chairman, but in principle I would say that we do need to have a number of our staff in the Commission to be collaborating with officials here in Westminster in both Houses, and that does mean

collaboration with those with responsibility for organising business on the Government side—on both Governments' sides—so that we can make the best possible use of time and the best possible use of parliamentary windows here. I listened to the earlier discussion and it is important that these orders are given due respect, and if there are people who are not supportive of devolution—as most of us are here in this room this afternoon and the gentleman after whom this room was named—it is important that people have the opportunity to feel that this does not undermine the United Kingdom. The way to do that is to show clearly that we can have procedures in place whereby what is contained within this Act can work on a practical and reasonable level, and that is why it is such an important question, but that is all to do with timetables of course. The window is here so that orders may be discussed. You could carry out the preparatory work required in pre-legislative scrutiny with our Committee and that is the means by which we could show people that it is possible for this new system to work up until the referendum is carried out—and neither you nor I, Chairman, know the date of that referendum as of yet.

Q70 Chairman: (Interpretation) Thank you very much on behalf of the Committee. We are extremely grateful to you for your concise, clear answers and on occasion eloquent answers. Merry Christmas!

Lord Elis-Thomas: (Interpretation) The offer is open if you do require any further written evidence from us.

Witnesses: **Ms Jenny Randerson**, Assembly Member and Chair, Committee on Standing Orders, and **Mr Gareth Williams**, Clerk, Committee on Standing Orders, National Assembly for Wales, gave evidence.

Q71 Chairman: Good afternoon and apologies for keeping you waiting. Could we ask you to introduce yourselves for the record please.

Ms Randerson: Jenny Randerson, Chair of the Assembly's Standing Orders Committee. This is Gareth Williams who is one of the Clerks to the Committee who has done the detailed drafting of the relevant Standing Orders.

Q72 Chairman: Could I begin by asking you a question about the Legislative Competence Orders. How will the procedure for Orders in Council which add a new Field differ from the procedure for those which vary an existing Field?

Ms Randerson: In practice they will not differ. We have put in the same procedures for both. We anticipate that it is an issue of the complexity of the specific Order which is being sought that will influence the approach to pre-legislative scrutiny both here and in the Assembly. We are very much of the view when we have written our Standing Orders that we have written them so that we can learn a new procedure, and what we have tried to

do is to produce Standing Orders which are as simple as possible in order to be transparent and accessible and also have a great deal of what we have called "white space" between the lines. We have done that on the recommendations of previous Clerks to the House of Commons. For that reason we have not sought to complicate matters, if you like to put it that way, by having different procedures for different types of proposal.

Q73 Hywel Williams: This is a question that has already been asked of other witnesses. What information and documentation do you foresee will accompany the proposed and draft Legislative Competence Orders?

Ms Randerson: I think that the information would have to be in an Explanatory Memorandum. We don't have in the case of a proposed Order a specific requirement as to what information will be in the Explanatory Memorandum. Ultimately obviously it is for Members to judge what information should be included. In the case of a

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proposed Order you would have your pre-legislative scrutiny which would involve taking evidence from witnesses, external stakeholders and so on, but in the case of a draft Order we would be more explicit in relation to what would be in the Explanatory Memorandum. That would have to include an explanation of how account has been taken of any recommendations made by other Assembly committees and reports prepared by the Houses of Parliament and the reasons for any significant differences between the draft Order and the proposed Order to which it relates.

Q74 Mr Jones: To what extent will parliamentary committees be provided with information on the extent to which the existing law of England and Wales might be amended as a result of a proposed measure?

Ms Randerson: The Explanatory Memorandum will set out what will be proposed. They are public documents and would obviously be provided to parliamentary committees.

Q75 Mr Jones: To what extent will it explain the extent to which the existing law of England and Wales will be affected by the measure?

Ms Randerson: The Explanatory Memorandum would not be doing its job if it did not set out in detail what legislation would be changed as a result of the proposal. However, the important thing is of course that it is a proposed Order in Council and the corresponding Measure that comes from it, or series of Measures which would be possible to come from it, would be a matter for the further stage, so we are looking at the competence of the Assembly at this stage and the fields of competence of the Assembly.

Q76 Mark Williams: In any protocol governing the preparation of LCOs should guidance be given in terms of the level of generality in which new powers can be expressed within that protocol?

Ms Randerson: Really this is not a matter for Standing Orders. I am sure however that the Assembly would welcome a protocol and I think that custom and practice will develop which sets out how general and how specific Orders in Council have to be. I listened with interest earlier on as Mr Ainger gave evidence and referred to this issue. He clearly anticipates it being fairly specific and I think probably in the early days it would certainly be that that would be the way in which the Assembly would work. Whether over a period of time one might work towards a slightly more general approach, I could not really say, but the issue is that it has got to comply with the Act. It has got to be therefore relatively specific and I cannot imagine that a proposal would be coming forward without a clearly anticipated measure coming from it, although that would not already have been drafted. The Member in charge will always have to make the decision as to whether it is specific enough to be acceptable to yourselves and to the Secretary

of State. In relation to the protocol that is clearly going to be an issue from government to government.

Q77 Nia Griffith: Can you tell us who will be responsible then for deciding that a proposed Legislative Competence Order should not be subjected to pre-legislative scrutiny? How will differences between the Assembly and the Secretary of State be resolved?

Ms Randerson: In relation to who decides whether there will be pre-legislative scrutiny or not that decision would be made effectively by the Business Committee and it would in many cases be something which would be initiated by the Government. I think there are probably two situations in which you would think there might not be pre-legislative scrutiny that is anticipated in the specific Standing Order that we have agreed. One would be in the case of an emergency and that would be for the Government to put its case to the Business Committee and the Assembly of course would have to agree that there should be no pre-legislative scrutiny because it could reject the proposal that this is an urgent matter and could require pre-legislative scrutiny. The second situation where we anticipate there might not be pre-legislative scrutiny included in the specific Standing Order is when effectively it has already taken place because it has been the subject of a committee inquiry. We have provision there that committees can initiate the Order in Council and therefore they can perhaps have already done a thorough pre-legislative scrutiny of their own, and so from the Assembly's perspective it may not be necessary to go through that process again. I think the issue here for you is that it will clearly be very wise for Assembly committees that have done an inquiry which leads them to put forward a proposed Order in Council for them to take evidence and information from yourselves and to take on board the views of both Houses of Parliament. Forgive me, I have forgotten the second half of your question.

Q78 Nia Griffith: I think that is enough on that, we will come back to that in a second. If we could look at the issue of the involvement of other parliamentary committees when we are talking about pre-legislative scrutiny. For example, there could be instances where a parliamentary committee such as the Joint Committee on Human Rights might be particularly interested in a piece of legislation. Do you think that it is likely that other parliamentary committees will wish to, and how do you see that linking into the whole process?

Ms Randerson: I think we have designed the Standing Orders in a way in which we leave the situation absolutely open and flexible for any committees that wish to make a report to do so. Clearly we have an issue in Standing Orders in terms of the timetable, so one of the positions in the Standing Order is that we can, with the agreement of the Assembly, go ahead without the report of a committee that has been looking at

something. That is essentially there to allow government to get its business through and to ensure that a particular committee cannot hold the whole legislation up unreasonably. The Business Committee has the power to amend the timetable so if a Committee develops an interest somewhere along the line the Business Committee can take that into account and extend its timetable and so on. Within the Assembly we have an open option where any committee that feels it has an interest could put its report to the legislative committee set up to do the pre-legislative scrutiny, and in the case of Parliament it is very much up to you as to how you wish to examine the issue and to put your reports to the Assembly.

Q79 Hywel Williams: When a committee proposes an Order, will there be any circumstances where the responsibility for its preparation and for relations with the Government here would then pass to the Welsh Assembly Government itself rather than be a matter for the committee?

Ms Randerson: Can you just repeat the question?

Q80 Hywel Williams: When a committee proposes an order, will there be any circumstances where it is the Welsh Assembly Government which takes responsibility for its preparation and then for any relationship or any negotiation with the Government here?

Ms Randerson: I suppose there is nothing in the Standing Order which would prevent that happening but the Standing Order is written with the intention that when a committee proposes an order that it has ownership of, that it nominates the Member in charge and it follows it through. I am aware that in Scotland, for example, on occasions the Government has adopted a committee proposal and has adopted a private Member's proposal and that in fact ensures that it is more or less guaranteed to go through, but the issue is of course that it will remain the committee's proposal unless there is the agreement of the committee that it hands it over. We do not specify anything like that procedure in Standing Orders and really it is a matter for the Assembly Parliamentary Service as it currently is, and the Commission as it will be, to ensure that it has all the resources necessary to see a proposal right the way through. However, I believe that behind the scenes there would certainly be discussion and it is important that there is a good liaison with yourselves in order to ensure that your views are fully taken into account. Gareth would like to add something.

Mr Williams: Just to clarify in terms of what the standing order says. While the Government could in theory take on a proposal, a member of the Government could not be the member in charge of that proposal so it would have to be withdrawn and then taken on by the Government.

Q81 Mr Jones: Will the preparation of an Order proposed by an individual Member of the Assembly remain the responsibility of that individual Member?

Ms Randerson: Yes it will and they have the right, if it is an Order in Council proposal to see it through and to see through the measure to the end. We do have provision in the Standing Orders that they could nominate another person to hand it to because we have envisaged that there might be situations where a Member might find, for a start, that their proposal has been so amended that they do not wish to carry it through or there could be circumstances in which someone starts a very worthwhile proposal that is making good progress and they cease to be a Member of the Assembly. We have got provision in the Standing Orders to ensure that it can be handed on to someone else, but the intention of the Standing Order is that someone who enters the ballot will see the whole thing through. There is one interesting aspect in relation to the ballot which is that when people put their names into the ballot they have to have a proposal and an Explanatory Memorandum prepared when they put their name into the ballot. That is really the recognition of our capacity issues in the Assembly. It has proved problematic to Assembly Members to get a fully developed legislative proposal in a reasonable timescale once their name comes out of the ballot. It is not like the situation here where if your name comes out of the ballot, I am aware that Members are besieged by proposals that are really quite well worked up for legislation. I think actually it is not just an issue of capacity in the Assembly; it is an issue of capacity in Welsh civil society. They have not yet produced lots of legislative ideas for us so we have put the idea that you will not put your name in the ballot unless you have a firm idea of what you want at the end. You can change the idea between ballots; you are not labelled with that idea forever and a day.

Q82 Mark Williams: You have heard this question for the third time now but it is your turn to answer. In pre-legislative scrutiny is provision being made for shortened or accelerated procedures which would dispense with pre-legislative scrutiny, for example in the situation of an emergency or technicalities?

Ms Randerson: Yes and I think actually I have touched on it earlier on when I answered Nia Griffith's question. Yes, there is a procedure in the Standing Orders that recognises the issue of an emergency. It does not specify urgency, it does not specify technicality, and I share the Presiding Officer's view of technicalities that what we regard as a technicality today comes to be considered an issue of basic principle tomorrow. We all recognise that emergencies do occur but the Assembly would have to agree that this is something which does not require pre-legislative scrutiny. We have built pre-legislative scrutiny in as something that we regard as a fundamental part of the process, partly because we recognise that in order to co-operate and to develop what we see as the important relationship with yourselves, we have to have a

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robust pre-legislative scrutiny proposal so that you are convinced that it has been well thought through and well examined. We also recognise that pre-legislative scrutiny makes much better law.

Q83 Nia Griffith: You say there that the Assembly has the last say in terms of whether something should be subject to pre-legislative scrutiny, but supposing the Secretary of State disagreed on that issue?

Ms Randerson: I meant within the Assembly, it would go to the Assembly as a whole rather than being a Government decision. That is to clarify my previous answer. Once of course it has left the Assembly, if you want to put it that way, then it is down to the Secretary of State who could reject the Order or he could order pre-legislative scrutiny which would take place here and effectively would ensure that it took place in the Assembly. So as regards the end of the process, it lies with Parliament and therefore we would have to respect that. However, having said that, I very much hope that we would not have a position where the Secretary of State had to intervene at that late stage. I would expect a Secretary of State who had concerns to have raised them much earlier on through the regular channels of government-to-government communication, and even if it was not a Government proposal then it would be something that the Government would have to communicate. It is a case of being politically sensitive to the situation, but I was reassured by the comments earlier on of Mr Ainger that he would not regard it as a likely situation that draft Orders in Council would be rejected by the Secretary of State.

Q84 Nia Griffith: Are you therefore confident about the Assembly's own procedures that it would give an opportunity for pre-legislative scrutiny not only perhaps to those committees which have an obvious interest but in fact to any committee across the Assembly or any Member who may have a peripheral interest in it?

Ms Randerson: There are numerous ways. We are proposing the establishment of *ad hoc* legislative committees for each piece of proposed legislation. We would expect that all relevant committees of the Assembly—scrutiny committees and committees such as the Equality of Opportunity Committee, which is specified in standing orders, and although it has not been officially approved yet I can be fairly confident that there is absolute cross-party support for an Equality of Opportunity Committee—to put in reports or to give evidence and information to the legislative committee. We would also expect civil society, voluntary organisations, and so on, also to be giving evidence. I think we have written the Standing Orders in a way which does not prevent but which enables at every stage.

Q85 Mr Jones: How do you envisage that the outcome of pre-legislative scrutiny will be factored into the LCO process?

Ms Randerson: I very much hope that the outcome will be a report of the committee and that will be presented to the Assembly via the explanatory memorandum. If there had been any significant changes to the proposed Order in Council by the time it gets to the draft stage, then the explanatory memorandum would have to explain that in detail, so that it would be factored in at every stage and you would have the full information as to why any changes had taken place.

Q86 Hywel Williams: To take that point about changes further, if there was an Order proposed and it had to be modified substantially because of serious reservations by the Secretary of State or because of the same thing by Parliament, would the standard scrutiny procedures then have to be repeated?

Ms Randerson: The Standing Order does not require that but of course the Explanatory Memorandum would have to explain it. However, I think there would be a political judgment to take as to whether the Government decided to go back at least partially through the scrutiny procedure. You would have an *ad hoc* committee established to do it so there would be no reason why that committee could not look at it again. It would be a perfectly simple process to dip your toe back in the water again and see whether further work needs doing.

Q87 Hywel Williams: That is going to be a matter of judgment as and when?

Ms Randerson: Yes and it will be a matter of judgment by the Government which will be responsible for most legislation, or the Member in charge of the committee proposal, and so on. It would be a matter of judgment as to whether they felt that they had explained enough why they had changed their proposal in order to still get the support of the Assembly as a whole. I would however say that there is no point in having pre-legislative scrutiny if you are not going to change things, and therefore I would see changes in the proposal as a sign of a strength of the process rather than of a problem. The only time it would be a problem is if in some way you have turned the whole proposal on its head and you have got an idea and you have decided to completely change the principle on which it is based as a result of the pre-legislative scrutiny.

Q88 Hywel Williams: Can I ask you about approval by the Assembly itself. If the plenary of the Assembly does not approve an order, and the proposer wants to continue with an amended or replacement proposal, would the entire procedure have to be repeated?

Ms Randerson: If a draft Order falls—it cannot be amended of course because of the 1946 Act—then it falls and the Government would have to go through the whole procedure again as the Government and so on. In the case of a private Member's piece of legislation then there is a detail

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in the Standing Order which says a similar proposal cannot come forward for another six months, so if it falls, it falls.

Q89 Chairman: Could I ask the last question and that is to do with parliamentary approval and safeguarding the interests of the Assembly. Could you make some observations about how one would envisage safeguarding the interests of the Assembly during the approval stages?

Ms Randerson: I think the important thing is that if a good working relationship through joint scrutiny, which has been referred to lots of times this morning, has grown up, then the whole process will have safeguarded the Assembly's interests. In formal terms, however, the interests of the Assembly will be safeguarded by the explanatory memorandum and the report of the committee. After all, both the draft order considered here and in the Assembly will have to be identical so they should be informed by very similar information, should they not? I think that the Assembly's interest will also of course have to be safeguarded by informal relationships government-to-government and Assembly-to-Parliament. I very

much hope that we will develop the habit of joint scrutiny which I regard as efficient in terms of everyone's time as well as the most effective way forward, and I think that is what will be the strongest thing that will safeguard our interests. Joint scrutiny will be useful in terms of not just hearing the same evidence but also being able to understand in detail viewpoints and concerns from one side to the other. You will have concerns and we will have concerns and it is important that those are aired and we are able then jointly to scrutinise something from the same basis. It will also save time because there is not much point in us reading your reports as well as doing our own scrutiny and you reading our reports as well as doing your own scrutiny. In terms of time saving it will be better if we did it jointly.

Chairman: On behalf of the Committee, could I thank you very much for the thoroughness of your answers. I must say that this has been a most instructive and constructive session this morning and there is a remarkable degree of goodwill and willingness to work together that augers well for the future. We look forward to working with you. Merry Christmas and a Happy New Year.

Memorandum submitted by Nick Ainger MP, Under Secretary of State for Wales, Wales Office and Ms Jane Hutt AM, Minister for Assembly Business, National Assembly for Wales

Government of Wales Act 2006

ORDERS IN COUNCIL CONFERRING LEGISLATIVE COMPETENCE ON THE NATIONAL ASSEMBLY FOR WALES

The Government of Wales Act 2006 makes provision for increased legislative competence to be conferred on the Assembly by way of Orders in Council under Section 95 of the Act. Each such Order will authorise the Assembly to make legislation (to be known as Assembly Measures) on matters set out in the Order. It will be possible only to specify matters if they fall within fields specified in Schedule 5 of the Act. This list of fields broadly follows those in Schedule 2 to the Government of Wales Act 1998, with some additions reflecting changes in the pattern of functions allocated to the Assembly since 1999.

The Wales Office and the Welsh Assembly Government are currently developing detailed guidance in relation to the Order in Council process.

However, to inform the Committee's consideration of this subject, this memorandum consolidates the current thinking on how the Order in Council process will work, and provides detail on the process of developing, scrutinising and making Orders in Council.

There are a number of steps in the Order in Council process and these fall into three distinct stages:

- Development and agreement of proposal between the Welsh Assembly Government, the appropriate UK Departments and the Wales Office;
- Pre-legislative scrutiny;
- Assembly and parliamentary consideration of the draft Order in Council.

DEVELOPING AND AGREEING PROPOSAL

Proposals for Orders in Council conferring legislative competence can be initiated by Assembly Members, Assembly committees and by the Welsh Assembly Government.

All formal requests for a draft Order in Council, to the Secretary of State will be made by the First Minister, however initiated.

Both the Welsh Assembly Government and the UK Government will have a view on the scope, vires and technical aspects of a proposed Order in Council and will need to engage in discussions on the implications of a proposal.

In circumstances where the Assembly Government has initiated the proposal, the initial stage would normally involve the preparation of a proposed Order in Council following discussion between the Welsh Assembly Government, Whitehall Departments, and the Wales Office. This will focus on ensuring there is clarity about the vires/scope of the Order in Council and confidence that it will give the necessary legislative competence to enable the Assembly Government's policy objective to be achieved.

We do not envisage that the number of proposals for Assembly Measures would be much greater than the number of requests for primary legislation that come through at present. The First Minister said that he would be surprised if there were initially more than five or six a year.

The process for proposed Orders in Council initiated by Assembly Members, and Assembly Committees will be matter for the Assembly's Standing Orders.

PRE-LEGISLATIVE SCRUTINY OF THE PROPOSED ORDER IN COUNCIL

The proposed Order will be put to the Assembly and Parliament for pre-legislative (non-statutory) scrutiny. The precise nature of pre-legislative scrutiny undertaken by the National Assembly and Parliament will be a matter for those two institutions to determine and of obvious interest to this Committee.

A recommendation that has a wide range of support and was frequently mentioned during the debate in Parliament during the passage of the Bill, is for pre-legislative scrutiny to be carried out on a joint basis between the Welsh Affairs Committee and the National Assembly for Wales. This approach is akin to the approach that has been used in recent years on Wales-only Bills, where the Welsh Affairs Committee and the relevant Assembly Subject Committee have carried out joint scrutiny.

It is anticipated that the report of the Welsh Affairs Committee, following its pre legislative scrutiny process, would usually be sufficient for the Commons. However if proposals were extensive, complex, or of considerable political interest it may be necessary for the Welsh Grand Committee to be convened to debate that report. It would be particularly advantageous if any pre-legislative scrutiny in the Lords was held concurrently with other scrutiny. As the Lords Constitution Committee has commented "*the scale of work involved in drafting legislative competence orders is likely to be relatively modest*" and that any scrutiny "*can complement rather than merely duplicate the work of the Welsh Affairs Committee*". It will be important that any scrutiny proposals bear this in mind.

To aid Parliament's consideration of a proposed Order in Council, each Order will be accompanied by an Explanatory Memorandum setting out the scope and policy background relating to the request. Both Parliament and the Assembly will then have the opportunity to make recommendations about the scope of the enhanced powers requested by the Welsh Assembly Government. The Order in Council example at Annex 1 includes an example of an accompanying Explanatory Memorandum.

The UK Government's "Better Governance for Wales" White Paper mentioned the procedure for considering the proposed Orders at paragraph 3.21, and in particular said:

"consideration [of draft Orders] could be informed by understanding the use the Assembly might propose to make of these powers in the immediate future. However, as the power would be a general and continuing one for that particular policy area, this would serve only as an example of what could be done; the issue for the [parliamentary] committees and for each House would be the appropriateness in general of delegating legislative authority to the Assembly on the particular policy area specified in the draft Order in Council".

A key consideration in applying the test of "appropriateness" could be the extent to which the policy area addressed in the Order in Council is one in respect of which the Assembly Government already exercises executive powers in the relevant Field in Schedule 5 to the Government of Wales Act.

Scrutiny of the proposed Order would be likely to include examination of the scope of the legislative competence being sought. Any proposed "matter" needs to be considered in the context of Section 94 and parts 2 and 3 of Schedule 5 of the Government of Wales Act 2006, which apply certain general constraints to the legislative competence of the Assembly.

FOLLOWING PRE-LEGISLATIVE SCRUTINY

In the case of Welsh Assembly Government proposals, the Welsh Assembly Government would consider any recommendations and discuss any resulting possible changes to the text of the order and covering memorandum, with a view to agreeing the final draft order (including informal agreement with the Secretary of State). Once a final draft is in place it will be submitted to the Assembly for approval. This would be the formal (statutory) process for the National Assembly to resolve to approve the final text of a draft Order in Council.

The formal trigger for the Assembly First Minister to notify the Secretary of State of the National Assembly's request for an Order in Council will be a vote in plenary. If approved by the Assembly the First Minister would then send notice in writing to the Secretary of State along with the draft Order.

SECRETARY OF STATE CONSIDERATION OF REQUEST FOR DRAFT ORDER

Under Section 95(7) of the Government of Wales Act the Secretary of State must within 60 days of the receipt of the resolution decide to lay the draft Order before Parliament, or give the First Minister notice in writing of his refusal to lay the draft order along with reasons for the refusal. It will be the responsibility of the first Minister to lay a copy of this notice before the Assembly and to ensure that it is published.

In the normal course of events, as far as Welsh Assembly Government proposals are concerned, agreement between the Welsh Assembly Government and the UK Government could be expected to be reached on the final draft Order before it was considered by the Assembly. This would allow the Secretary of State at this stage to proceed directly to lay the draft Order, as approved by the Assembly, before Parliament.

However it may not always be the case that a draft Order approved by the Assembly will either have been considered and agreed in advance by the UK Government or subject to pre-legislative scrutiny in Parliament. Section 95(7) provides the opportunity for the Secretary of State, in such cases, to consult colleagues or to invite pre-legislative scrutiny in Parliament before deciding whether the draft Order as approved by the Assembly should be laid before Parliament.

PARLIAMENTARY PROCESS

Once the Secretary of State has decided to lay the draft Order, the draft Order will be subject to the Affirmative Resolution procedure and both Houses of Parliament will be invited to give their approval to the final text of the draft Order in Council. At this stage the Order in Council will not be amendable as both the National Assembly and Parliament will need to approve identical text.

The draft Order in Council will be accompanied by an Explanatory Memorandum and there will be debate in both Houses.

The two legislatures' consideration of the final Order in Council in Cardiff and London will be co-ordinated via the Assembly First Minister and the Secretary of State.

Following approval in both Houses the draft Order will be referred to the Privy Council to be made. The new legislative competence will then be inserted as a matter under the relevant Field in Schedule 5 of the Government of Wales Act 2006.

A flowchart illustrating the stages in the process is attached at Annex 2.²

GUIDANCE

Revised guidance for Whitehall departments is currently being prepared to include detailed information on the Order in Council process. A programme of seminars for Whitehall departments is also being undertaken, offering specific training for UK bill teams and legal departments. There is also an extensive training programme for staff of the Welsh Assembly Government and the Wales Office.

ASSEMBLY MEASURES

Once an Order in Council has conferred enhanced legislative powers in relation to a particular matter, a draft Measure can be brought forward in the Assembly. The National Assembly's arrangements for scrutinising and approving Assembly Measures will be a matter for the Assembly itself, subject to the minimum requirements set out in the Act.

December 2006

200– No —

CONSTITUTIONAL LAW**DEVOLUTION, WALES**

The National Assembly for Wales (Legislative Competence) (Public Administration) Order 2007

Made 1st December 2007

Coming into force 1st February 2008

At the Court at Buckingham Palace, the 1st day of December 2007

Present,

The Queen's Most Excellent Majesty in Council

Whereas a draft of this Order has been laid before, and approved by a resolution of, each House of Parliament and of the National Assembly for Wales:

Now, therefore, Her Majesty, in pursuance of section 94 of the Government of Wales Act 2006, is pleased, by and with the advice of Her Privy Council, to order, and it is hereby ordered, as follows—

Citation and commencement

1. This Order may be cited as the National Assembly for Wales (Legislative Competence) (Public Administration) Order 2007 and comes into force on 1st February 2008.

Enhancement of legislative competence

2. Part 1 of Schedule 5 to the Government of Wales Act 2006 is amended by inserting under “Field 14: public administration”—

“Matter 14.1

The creation of, and conferral of functions on, an office or body for and in connection with investigating complaints about relevant public sector persons, social landlords and members and co-opted members of local authorities, remedies where such complaints are upheld and the abolition of offices or bodies with similar functions; and for this purpose a person is a relevant public sector person if the person has functions of a public nature exercisable in relation to Wales or a part of Wales all or some of which are in a field listed in this Part of this Schedule and either—

- (a) at least one-half of the expenditure on the exercise of the person's functions of a public nature in relation to Wales or a part of Wales is charged on the Welsh Consolidated Fund or is met directly or indirectly from payments made out of that Fund or from payments made by one or more other relevant public sector persons, or
- (b) the person has the power to issue a precept or levy.”

Clerk of the Privy Council

EXPLANATORY NOTE

(This Note is not part of the Order)

Section 94 of the Government of Wales Act 2006 (“the Act”) empowers Her Majesty, by Order in Council, to enable the National Assembly for Wales (“the Assembly”) to make laws, by Assembly Measure, in accordance with the provisions of the Act and the Order.

The effect of this Order is to enable such laws to be made in relation to the matter set out in the words to be added to Part 1 of Schedule 5 to the Act. The Act provides for an Order under section 94 to add a matter which relates to one or more of the fields listed in that Part.

CONSTITUTIONAL LAW: DEVOLUTION, WALES

Proposal for a Legislative Competence Order in the field of Public Administration

[NB this memorandum is drafted as if the Public Services Ombudsman Act 2005 did not exist and an Order in Council under what is currently clause 94 of the Government of Wales Bill was required to enable the Assembly to reorganise by Assembly Measure the provision of public sector Ombudsman's services in Wales.]

INTRODUCTION

1. The Government of Wales Act 2006 (“the 2006 Act”) empowers Her Majesty, by Order in Council, to confer continuing competence on the National Assembly for Wales (“the Assembly”) to legislate by Assembly Measure on specified matters. Assembly Measures may make any provision which could be made by Act of Parliament (and therefore can modify existing legislation and make new provision), in accordance with the competence conferred by the Order in Council but subject to the provisions of the 2006 Act.

2. The attached document is a proposed Order in Council. It sets out a matter which it is proposed to add to the legislative competence of the Assembly. In order to do so, an Order in Council will need to be made by Her Majesty following approval of a draft of the Order by the Assembly and by both Houses of Parliament.

3. This memorandum has been prepared by the Welsh Assembly Government. It explains the background to and context of the proposed Order in Council.

SCOPE

4. The matter set out in the proposed Order in Council would confer on the Assembly the competence to legislate to reorganise the arrangements for the provision of public sector Ombudsman's services in Wales. These services are currently provided via the offices of the Commission for Local Administration in Wales, the Welsh Administration Ombudsman, the Health Services Commissioner for Wales and the Social Housing Ombudsman for Wales.

5. Under the provisions of the 2006 Act, a matter can only be brought within the legislative competence of the Assembly if it relates to a Field set out in Part 1 of Schedule 5 to the 2006 Act. The Fields correspond broadly with the executive competence of the Welsh Assembly Government; the White Paper “Better Governance for Wales” explains that the policy intention behind this provision is that the Assembly should acquire legislative competence only in fields in which the Welsh Assembly Government has executive functions.

6. Executive responsibility for matters concerning the Welsh Administration Ombudsman, the Health Services Commissioner for Wales and the Commission for Local Administration in Wales lies with the Welsh Assembly Government. The related funding in all cases comes from the Welsh Consolidated Fund.

7. The legislation governing the offices of the existing Ombudsmen's services (the Welsh Administration Ombudsman, the Health Services Commissioner for Wales and the Commission for Local Administration in Wales) is contained respectively in the Government of Wales Act 1998; the Health Service Commissioners Act 1993; the Local Government Acts 1974 and 2000; and the Housing Act 1996. The existing legislative competence of the Assembly would not allow it to modify or repeal provisions in those Acts, nor to make new provision creating any new ombudsman's office for Wales. The Order in Council, if made in terms of the draft before the Committee, would enable the Assembly to take such legislative action.

8. The Ombudsman services in relation to which the Assembly would be able to legislate would be those whose investigation function can only apply to persons (which includes bodies as well as individual office holders) who have functions of a public nature within devolved fields and which are dischargeable in relation to Wales or part of Wales and provided they receive at least half their finance (directly or indirectly) from the Assembly Government or from another body which is itself subject to investigation, or they have the power to issue a precept or levy. The investigation of complaints against social landlords would be within the scope of the legislative competence, as would the investigation of complaints about the conduct of local authority members.

BACKGROUND

9. This request for legislative competence derives from a manifesto commitment made at the Assembly general election in May 2007.

10. Currently, three out of the four statutory Ombudsman offices in Wales—the Health Service Commissioner for Wales, the Commissioner for Local Administration in Wales, and the Social Housing Commissioner for Wales—are held by the same person. The third office, however, cannot be held by the same person because provisions in the Government of Wales Act 1998 and Local Government Act 1974

make it clear that a Commissioner for Local Administration in Wales (the local government ombudsman) exists in addition to the Welsh Administration Ombudsman. The post of Welsh Administration Ombudsman is currently held on an acting basis by the Parliamentary Commissioner for Administration.

11. The Commissioner for Local Administration in Wales is also responsible for investigating of complaints in relation to standards of conduct of members and employees of local authorities in Wales under Part 3 of the Local Government Act 2003.

12. Although staff of the Health Service Commissioner for Wales and the Welsh Administration Ombudsman share offices and—to a certain extent—workload, the offices of the Commission for Local Administration (and Social Housing Ombudsman for Wales) are completely separate. Arrangements, both statutory and administrative, exist for the sharing of information between the different offices. However the statutory requirements applying to the work of each of the four offices are different. Most importantly, those in receipt of public services are faced with sometimes complex decisions about which Ombudsman should deal with a complaint about maladministration which the public bodies concerned have been unable to resolve to the complainant's satisfaction.

13. The First Minister's strategic statement of 22 May 2007 confirmed the Welsh Assembly Government's manifesto commitment, to seek to introduce legislation at the earliest opportunity to give the public a single point of reference for complaints of maladministration in the Welsh public service. This is part of a wider programme of reform to create citizen-centred, seamless public services.

EFFECT OF OTHER PROVISIONS IN THE 2006 ACT

14. The effect of this Order needs to be considered in the context of the overall provisions of the 2006 Act.

Geographical limits of any Assembly Measure

15. If an Order in Council were made in substantially the form proposed, the Assembly would by Measure be able to reform the provision of public sector ombudsman's services in Wales, even though the Local Government Acts 1974 and the Health Service Commissioners Act 1993, which provide the authority for the existing arrangements also make provision concerning Ombudsman's services in England. Section 93 of the 2006 Act provides that no Assembly Measure will be law if it applies otherwise than in relation to Wales or confers, imposes, modifies or removes functions exercisable otherwise than in relation to Wales (or gives power to do so). There are limited exceptions for certain kinds of ancillary provision, for example provision appropriate to make the provisions of the Measure effective, provision enabling the provisions of the Measure to be enforced and to make consequential amendments to other legislation. Such provision is likely to be necessary, for example, to ensure that any new Ombudsman's service for Wales could share information as necessary with counterparts in other parts of the UK; to ensure that courts throughout England and Wales could enforce any remedies ordered by an Ombudsman (if such remedies are provided for in a Measure); and to amend references in other legislation to any existing offices which an Assembly Measure had abolished.

16. The limitation relating to functions other than in relation to Wales means that the Assembly would not be able by Measure to confer on an Ombudsman the power to investigate matters which did not relate to Wales.

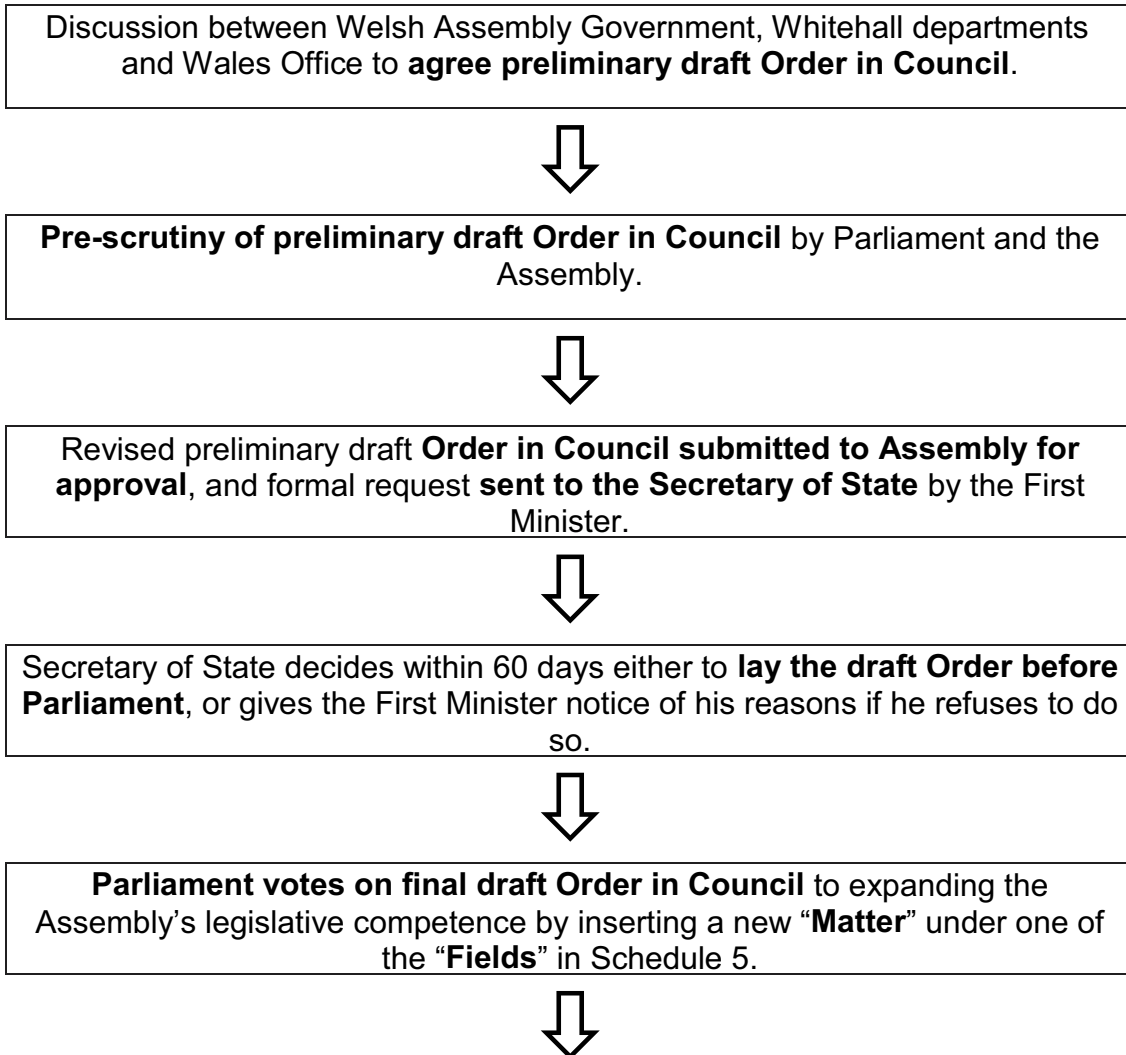
Minister of the Crown functions

17. There are several public service functions in Wales which are not devolved, for example the administration of social security and the employment service and the operation of police authorities. Complaints of maladministration in relation to these public service bodies are within the remit of the Parliamentary Commissioner for Administration (PCA). The proposed Order in Council would not enable the Assembly to alter this. Although the office of PCA is independent of government, functions concerning that office lie with the UK Government, in particular the Cabinet Office and Treasury. By virtue of Part 2 of Schedule 5 of the 2006 Act, the Assembly may not by Measure alter the functions of Ministers of the Crown without the consent of the Secretary of State but in any event the requirement that persons who may be investigated must discharge functions within devolved fields and must (except in the case of precepting or levying bodies) receive at least one-half of their finance from the Welsh Ministers or from other persons themselves subject to investigation means that an Assembly Measure could not affect bodies within the remit of the PCA.

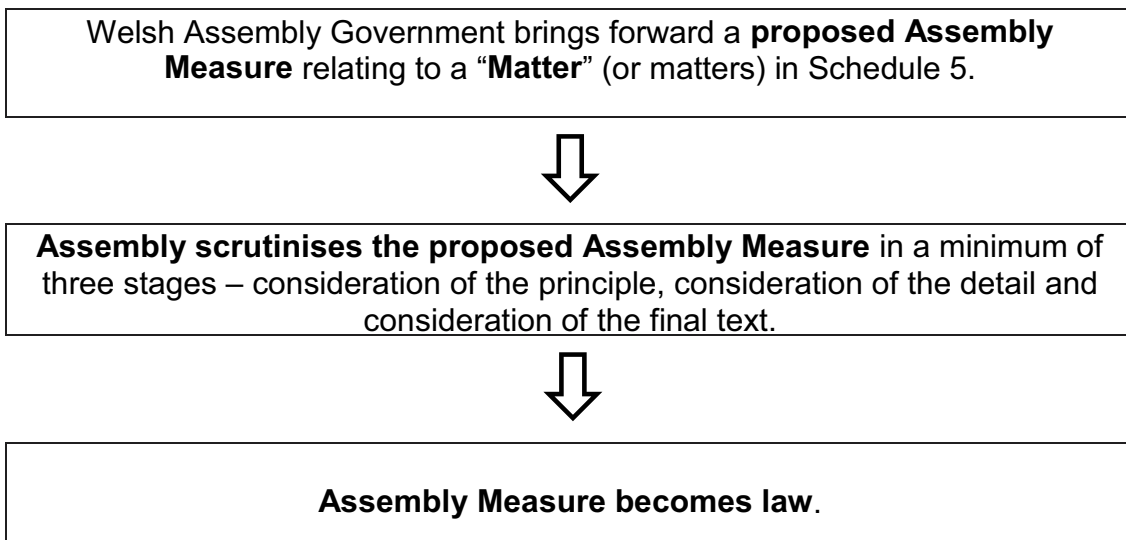
CONCLUSION

18. The Welsh Assembly Government invites the Welsh Affairs Committee to consider whether it would be appropriate for legislative competence on Ombudsman's services in Wales, in the terms of the proposed draft Order in Council attached, to be conferred on the Assembly.

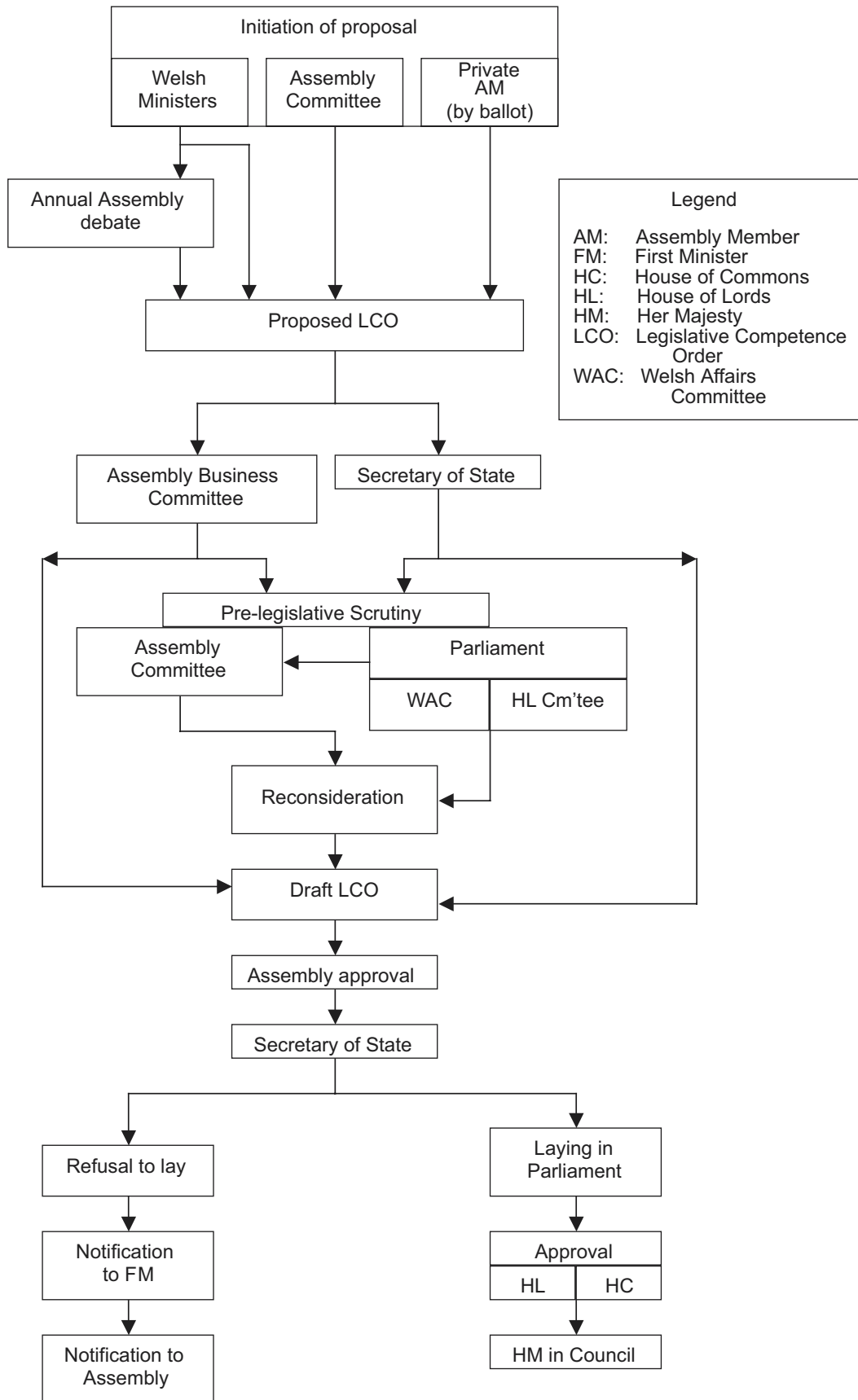
PROCESS FOR AN ORDER IN COUNCIL



PROCESS FOR AN ASSEMBLY MEASURE



Memorandum submitted by Professor Keith Patchett, Special Adviser to the Committee



Legend
 AM: Assembly Member
 FM: First Minister
 HC: House of Commons
 HL: House of Lords
 HM: Her Majesty
 LCO: Legislative Competence Order
 WAC: Welsh Affairs Committee

Memorandum submitted by Cymru Yfory—Tomorrow's Wales**IMPLEMENTATION OF THE GOVERNMENT OF WALES ACT 2006**

1. This submission is made on behalf of Cymru Yfory—Tomorrow's Wales, an all-party and non-partisan group established following publication of the Richard Commission's report in 2004 and chaired by the Archbishop of Wales.

2. Cymru Yfory shares the concerns expressed by many academic and expert commentators about the workability of the procedures to confer legislative powers on the National Assembly for Wales by Part 3 of the Government of Wales Act 2006. In this respect, it would draw the Committee's attention to the analysis of these problems made by Lord Richard in recent speeches in Cardiff in September and at the University of Glamorgan in November 2006.

3. Cymru Yfory has two main concerns about the procedures to be put in place in Westminster to deal with Orders in Council. The first relates to the nature of those procedures. Cymru Yfory would emphasise to the committee the value of ensuring that any procedures put in place to deal are simple, clear and comprehensible to lay people. Welsh devolution is already bedevilled by a high degree of obscurity and complexity, which greatly complicates the work of civil society in understanding how Wales is now governed, and in participating in that process. The procedures adopted by the Committee can contribute significantly to making Welsh government and law-making accessible to and comprehensible by the public at large. Cymru Yfory therefore hopes that these procedures will be clear and comprehensible in themselves, and interact in a clear and comprehensible way with procedures adopted by the Secretary of State for Wales, the Welsh Assembly Government and the National Assembly. They should have the effect of ensuring, to the maximum degree possible, that it is possible for those outside government to understand who is responsible for taking policy decisions about any particular matter.

4. The second relates to the relative roles of the UK Parliament and the National Assembly in legislating for Wales regarding matters which are or may be devolved under Part 3 of the 2006 Act. Cymru Yfory is concerned about the extent to which Westminster consideration of orders in council may develop into discussion of Assembly or Assembly Government policy, and (if that happens) the implications of such discussion. It appears to Cymru Yfory that discussion of the policy of the National Assembly or the Welsh Assembly Government as part of the process of deciding whether to approve the conferral of legislative powers by an Order in Council would raise serious issues of constitutional principle and political practice. In particular, it would confuse accountability and responsibility for any particular policy between the National Assembly and Westminster. This may be attractive to some politicians, who can thereby seek to take credit for successful policies, but it may also mean that each set of politicians have to take the blame for unsuccessful policies, and for any policies blocked (about which it will be impossible to come to a judgement). The upshot would be that it would be all the harder for the public at large to understand which level of government was responsible for what, and whom they approach regarding a particular problem. Such an approach may also lead to increased intergovernmental friction, especially if governments of different political complexions in London and Cardiff have to deal with each other.

5. In the interests of clarity and transparency, it therefore appears best to Cymru Yfory if the two sets of deliberations are kept as separate as possible, and that consideration of orders in council at Westminster are directed toward the constitutional rather than policy issues involved.

6. One practical implication of this relates to the way in which committees at Westminster and in Cardiff Bay approach the pre-legislative scrutiny of orders in council. There have been suggestions of continuing the existing practice of joint sittings to scrutinise legislative proposals emanating from the Assembly or Assembly Government. However, a continuation of that practice will risk the sort of confusion of responsibility that concerns us. It would be better for such joint sittings to cease; if they continue, there will need to be careful consideration of the remit of members of each institution's committee and their respective roles. Such a careful approach would, of course, militate against the sort of free-wheeling open discussion that characterises such committee work at its best. This would be a regrettable loss, but better than the confusion that would otherwise result.

7. In any event, whatever approach is recommended by the Committee, that approach will need to apply to all proposals to confer legislative powers on the Assembly. It would be inappropriate for one form of scrutiny to apply to conferrals by orders in council, and another to apply to ones coming by other routes such as provisions in Westminster bills. The attention of the committee is drawn to clause 26 of the Further Education and Training Bill, recently introduced into the House of Lords, which amends Schedule 5 of the 2006 Act and confers Measure-making powers on the Assembly in relation to vocational training and post-16 education. If this approach is used in future to confer powers on the Assembly, it should be subject to the same sort of scrutiny as orders in council conferring similar powers.

December 2006

Supplementary memorandum submitted by the Wales Office

FRAMEWORK POWERS

INTRODUCTION

The White Paper “Better Governance for Wales”, published in June 2005, set out proposals for delivering the Government manifesto commitment to enhance the legislative powers of the National Assembly for Wales.

The first stage of these proposals was described as follows:

“the Government intends for the future to draft Parliamentary Bills in a way which gives the Assembly wider and more permissive powers to determine the detail of how the provisions should be implemented in Wales.”

As a result broadly drafted subordinate legislation powers, referred to as “Framework Powers” were included in two UK Acts prior to the full implementation of the Government of Wales Act 2006. These Acts were the NHS Redress Act 2006 and the Education and Inspection Act 2006. These original Framework Powers were drafted as free-standing provisions not contingent on the passage of GOWA 2006. The passage of the Act now necessitates a change in the way Framework Powers operate and there are two key reasons why this is the case.

First, as result of the separation of the Welsh Assembly Government from the National Assembly, the power to make subordinate legislation will pass to the Welsh Ministers, rather than being held by the Assembly as a corporate body as at present. It would clearly be inappropriate for the Welsh Ministers to have broad powers to amend primary legislation of the type included in those two Acts, so it is necessary to ensure that the powers remain with the full Assembly rather than the Executive.

Secondly, the Act created a new type of legislative instrument—Assembly Measures—which will be subject to full scrutiny comparable to that of primary legislation at Westminster. When the original “Framework Powers” were considered by Parliament, the Government gave a commitment that any legislation made under those provisions would receive full and detailed scrutiny and would be amendable by the Assembly. In light of the fact that subordinate legislation powers are now passing to Ministers, Assembly Measures are now clearly a more appropriate and accountable vehicle as a result of the 2006 Act.

The logic underpinning this change of approach is consistent with how framework powers are handled by GOWA 2006. The Act provides a mechanism whereby existing “Framework Powers” can be converted into legislative competence under Schedule 5 of the Act, enabling the Assembly to pass Measures in relation to those matters. We will shortly be laying an Order to give to the Assembly as constituted by GOWA 2006 the “Framework Powers” in the NHS Redress and the Education and Inspection Acts.

The benefit of conferring powers on the new Assembly by way of amendment to Schedule 5 will be clear: it will lead to greater uniformity and consistency in how powers are expressed, and it helps to make the statute book more readily accessible.

The concept of Framework Powers includes powers post Government of Wales Act 2006, as the Government intends that future primary legislation containing Framework Powers should be drafted consistently with this approach by adding “Matters” to Schedule 5.

Drafting future Framework Powers in this way, to work through Schedule 5 of GOWA 2006, reflects the scheme created by GOWA 2006 and in particular the separation of the legislature from the executive. The difference in drafting pre-GOWA 2006 and post-GOWA 2006 does not affect the nature of the powers to be conferred: in each case the Assembly will be able to determine the detail of the legislation to be made, within the scope of the legislative competence conferred.

FRAMEWORK POWERS AFTER MAY 2007

The Government’s policy on Framework Powers was set out in the *Better Governance for Wales* White Paper and this remains the Government’s approach. Framework Powers in UK Bills will continue after May 2007.

Primary legislation covering England and Wales after May 2007 will continue to make provision for Wales where appropriate. In some cases, the Assembly will simply wish to replicate English provisions. Parliament will then (with the Assembly’s consent where appropriate) apply those provisions to Wales too (consistent with para 3.28 of the White Paper). In other cases, the Assembly may wish to adopt a different approach from England—in which case, in line with para 3.12 of the White Paper, the Government remains committed to drafting the legislation in a way that gives the Assembly broader and more permissive powers to enable it to shape legislation for Wales in relation to devolved functions. Framework Powers remain the way in which this will be achieved.

The parameters of the Assembly’s legislative competence will be the Matters in Fields in Schedule 5 of the Act, whether those matters are inserted by Framework Powers in Bills or Orders in Council.

As with Orders in Council, the Government is committed to ensuring proper scrutiny of Framework Powers in UK Bills. The Welsh Assembly Government will produce an Explanatory Memorandum to accompany each proposed “Framework Power” in a Bill, as it will for each proposed Order in Council. The Explanatory Memorandum will be placed in the Libraries of both Houses.

Furthermore, Parliament will be able to scrutinise “Framework Powers” in Bills by bring forward amendments in the same manner as for other provisions in primary legislation. And any Assembly Measure subsequently brought forward under those powers would of course be subject to a full scrutiny by the Assembly.

DEVELOPMENT OF PROPOSALS FOR FRAMEWORK POWERS

Proposals for Framework Powers in primary legislation are developed through intergovernmental negotiations in much the same way as other provisions in primary legislation that fall within the competence of the Welsh Assembly Government.

While there are functional similarities between framework powers in Bills which add “Matters” to the Assembly legislative competence and the content of the proposed Orders in Council, it is likely that proposals for Framework Powers in Bills will come about in a rather different way. On the one hand, Orders in Council will almost always be initiated by the Welsh Assembly Government or the Assembly in order to achieve a particular, distinctive policy objective that may be relatively well developed at the time the proposal is formally brought forward. In contrast, Framework Powers in Bills will be sought in response to a proposal for legislation from the UK Government.

Because neither the Welsh Assembly Government nor the Assembly has any control over the timing of Framework Powers in primary legislation, it is likely that they will in many instances be brought forward at an earlier stage of policy development than Orders in Council. By using the Framework Powers route in Bills, Wales will be able to develop legislation to implement distinctive policy approaches in future without the need to use Parliamentary time for an Order in Council, on a topic on which Parliament has only recently legislated.

In both cases however the considerations will be similar, since the issue for Parliament will be the appropriateness of granting the Assembly what will be an enduring legislative competence to pass Assembly Measures in relation to the Matters specified. The “Framework Power” in the Further Education and Training Bill is a case in point. The Welsh Assembly Government recently established its own Further Education review under Sir Adrian Webb and is at a different stage of policy development from England. “Framework Power” will enable the Assembly to pass its own legislation once Sir Adrian has reported.

19 February 2007
